INDEX

AUTHORITIES CITED

CASES:

CONSTITUTION AND STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 97

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

v.

NEIL H. McELROY, Individually; THOMAS S. GATES, Individually and as Secretary of Defense; D. M. TYREE, Individually and as Superintendent of the United States Naval Gun Factory; and H. C. WILLIAMS, Individually and as Security Officer of the United States Naval Gun Factory,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The en banc opinion of the Court of Appeals, Judges Edgerton, Bazelon, Fahy and Washington dissenting, is not yet reported (R. 144-181). The opinion of the division of the Court of Appeals reversed by the en

banc decision, Judge Danaher dissenting, will not be reported (R. 134-139).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1960 (R. 182). The petition for a writ of certiorari was granted on October 10, 1960 (R. 200). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A civilian nongovernmental employee works as a short order cook at a cafeteria located within the premises of the Naval Gun Factory. The employee works for a civilian nongovernmental employer who operates the cafeteria under a contract with the Naval Gun Factory. The superintendent of the Naval Gun Factory and his security officer cause the employee to lose her job at the cafeteria because she allegedly fails to meet the "security requirements." There was no disclosure of what the security requirements constitute, no statement of reasons particularizing the respects in which the employee allegedly failed to satisfy them, and no hearing of any kind at which to know or meet the evidence supporting the bare conclusion. The question presented is whether the officers acted without authority, and if their action was authorized, whether it was constitutional.

STATUTES INVOLVED

The constitutional, statutory, and administrative provisions are too numerous to list and are set forth in relevant part in the course of the brief.

[1] An order entered on April 18, 1960, withdrew the division's opinion and stated that it would not be published (R. 183).

STATEMENT

I. The Status of the Union, the Employer, and the Employees; the Employer's Agreements With the Union and the Naval Gun Factory

M & M Restaurants, Inc., a civilian nongovernmental employer, operated three main cafeterias for and on the premises of the United States Naval Gun Factory,[2] a naval installation located within the District of Columbia on federal property (R. 4, 5, 90, 93, 97, 107). The workers in the employ of M & M who man the cafeterias are civilian nongovernmental personnel (*ibid.*).

Up to September 1946, the cafeterias at the Gun Factory had been operated by a Miss H. K. Dickson. In 1942, during the period of Miss Dickson's operation, Petitioner Union was certified by the National Labor Relations Board as the exclusive bargaining representative of the employees working at the cafeterias, following an election conducted by the Board on July 15, 1942. (R. 4-5, 49-50, 90, 93.) In September 1946, M & M took over the operation of the cafeterias from Miss Dickson (R. 5, 90, 93). From that time, throughout the period of its operation of the cafeterias, M & M recognized the Union as the exclusive bargaining representative of its employees at the cafeterias (R. 5, 90). Section 1 of the collective bargaining agreement between M & M and the Union, entered into on March 15, 1954 and in effect at the times material to this controversy, provides that (R. 5, 18-19, 90):

> The Employer agrees to recognize the Union as the exclusive bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of

[2] Effective July 1, 1959, the name of the Gun Factory was changed to the United States Naval Weapons Plant. Washington *Evening Star*, p. B-1, col. 6, May 18, 1959.

> the Navy Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

Section 6 of this collective bargaining agreement provides in part that (R. 5, 19, 90):

> The Employer agrees not to suspend or discharge any employee without good and sufficient cause.

This provision has been in each of the collective bargaining agreements between M & M and the Union since the inception of their relationship in September 1946 (R. 5, 50, 90).

M & M operated the cafeterias pursuant to an agreement, entered into on October 1, 1955, between M & M and the Board of Governors of the Naval Gun Factory Cafeterias. This agreement is styled "Agreement For Food Services Concessionaire." The personnel of the Board of Governors, composed of seven civilian governmental employees employed by the Gun Factory, are appointed by the Superintendent of the Gun Factory. (R. 5-6, 90, 94.) Section 5(b) of the Concessionaire Agreement provides that (*ibid.*, emphasis supplied):

> The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this Agreement. *In no event shall the Concessionaire engage or continue to engage, for operations under this Agreement, personnel who*
>
> (i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) *fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.*

II. M & M's Separation of Petitioner Rachel M. Brawner From Employment at the Bellevue Annex Cafeteria at the Request of the Security Officer of the Naval Gun Factory

One of the cafeterias operated by M & M for the Gun Factory is known as the Bellevue Annex Cafeteria, located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C. Petitioner Rachel M. Brawner worked at that cafeteria as a short order or breakfast cook. Up to her separation on November 15, 1956, Rachel Brawner had been employed by M & M for six and one-half years. Working Monday through Friday, 6:00 a.m. to 3:00 p.m., at the hourly rate of $1.18, she operated the steam table at the cafeteria, prepared and served breakfast and lunch, cleared tables, washed dishes, and cleaned up. Rachel Brawner's employment record was completely satisfactory and she was above average in the discharge of her duties. (R. 6, 27, 39-41, 62, 90, 94.)[3]

On November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned

[3]Rachel Brawner, 38 years old, is married, lives with her husband, and has nine children. A resident of the District of Columbia since she was three, she attended the District schools to the eleventh grade. A member of the John Stewart Memorial Church, a Methodist church, she attends services regularly. Rachel Brawner reads Good Housekeeping, Readers Digest, Better Homes and Gardens, and Watchtower, and she belongs to the Condensed Book Club, the books of which are put out by the Readers Digest. Her daily newspaper fare consists of the Washington *Star* and the Washington *News*. She favors the Democratic Party. (R. 38-39, 44-45.)

Harold R. Baker, supervisor of M & M's cafeterias at the Gun Factory, to request that M & M have Rachel Brawner turn in her identification badge (R. 7, 90, 94). Pyles informed Baker that respondent H. C. Williams, security officer of the Gun Factory, had advised that a question of security clearance for Brawner existed and that he, the security officer, would no longer permit her to have the badge (R. 7, 36-37, 56, 90, 98).[4] Pyles further told Baker that, should the request to lift Brawner's identification badge be questioned in view of the provision of the collective bargaining agreement safeguarding employees from discharge except for "good and sufficient cause," section 5(b) of the Concessionaire Agreement should be cited as authority for the action requested (R. 7, 68-69, 90).[5]

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[4] While respondents in their answer to the complaint denied the allegation contained in this sentence (R. 94), in their answers to interrogatories they stated that "Mr. Baker inquired as to the reason [for having Rachel Brawner surrender her identification badge to Lieutenant Commander Williams] and was informed that it was for security reasons and that the badge was to be returned as soon as possible" (R. 98). The import of the allegation of the complaint and the answer to the interrogatory is therefore identical. The Company admitted the allegation of the complaint (R. 90), and the allegation corresponds to the sworn and uncontroverted testimony at the arbitration hearing (R. 36-37, 56).

[5] While respondents in their answer to the complaint denied the allegation contained in this sentence (R. 94), their answer to the interrogatories simply failed to advert to this element of the conversation (R. 98-99). This element of the conversation was admited by M & M in its answer (R. 90), and it corresponds to the sworn and uncontroverted testimony of its agent at the arbitration hearing (R. 68-69, 62-63), the agent having participated in the conversation. Furthermore, in his letter to counsel for the Union, respondent Tyree, superintendent of the Gun Factory, specifically adverted to Section 5(b)(iii) of the Concessionaire Agreement as authority for the action taken (R. 32-33). There is therefore no reason to doubt this element of the conversation. It is in any event not material to the disposition of the questions of law.

On November 15, 1956, M & M relieved Rachel Brawner from work at the cafeteria, and instructed her to proceed to the office of Harold R. Baker. There, Baker stated to Brawner that he had been requested to pick up her identification badge, and, when asked why, he stated "for security reasons." Shocked and surprised, Brawner denied that she had ever done anything to bring her security status into question, and she asked what recourse she had. Baker stated he could not tell her anything except that he had been directed to pick up her badge. He suggested that she might see the security officer, or the superintendent, or Oliver T. Palmer, the business agent of the Union. Brawner turned in her badge. (R. 12, 41-42, 61, 90.) As Rachel Brawner testified at the ensuing arbitration hearing (R. 41-42):

> Well, when I first went in, I sat down and Mr. Baker told me that he was sorry, that he had been told to pick up my badge, and I asked Mr. Baker what for, and he said: "For security reasons."
>
> I said "What about security? I haven't did anything. I don't know anything that I did."
>
> And he said: "That's all I know, to pick up your badge."
>
> I said: "What must I do or who do I see?"
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> He said: "Write a letter to the Superintendent of the Yard," and he said "I would"—well, he said if he were me, he would write a letter to the superintendent.
>
> * * *
>
> I turned my badge over to Mr. Baker, and he asked the clerk to write me a slip of paper to get out of the gate, so that I could show it to the Marine on the gate.

Baker testified at the arbitration hearing that he observed that "naturally it upset her a great deal"; he noted that "I could not tell her anything except I had been directed to take such an action"; and he "tried to explain to her the several steps which I thought might be possible for her to follow, including going to the Security Officer himself, and to the Superintendent, and of course I also told her to see Mr. Palmer, her business agent" (R. 61).

On November 15, 1956, Baker turned over Brawner's identification badge to the security officer, respondent H. C. Williams. At that time, admittedly, the security officer gave no reason for his action, except to say that he would not permit her to continue to retain the badge because her security status was in question. Admittedly, neither before, then, nor thereafter did the security officer, the superintendent, the Board of Governors, or any other official give any explanation for this conclusion to either Brawner, the Union, or M & M (R. 8, 90, 94).

On November 16, 1956, M & M received a confirmatory memorandum from the Board of Governors (R. 8, 58, 91, 95):

> 1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. C. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.
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> 2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

From November 15, 1956, Rachel Brawner no longer worked for M & M. From that day forward she has received no wages or other benefits from M & M. (R. 13, 90.)

An identification badge is required to secure entrance to and exit from the grounds of the Gun Factory (R. 7, 90, 94). At the time of her initial employment at the Gun Factory, Rachel Brawner had been, as are all employees, screened to determine her eligibility to receive an identification badge, and no question of her eligibility to have it had been raised for six and one-half years (R. 8, 63-67, 99-100, 101-103).

In the course of her employment at the cafeteria Rachel Brawner had no access to classified information. Indeed, Harold R. Baker, supervisor of M & M's cafeterias at the Gun Factory, has no access to classified information. (R. 8, 68, 94, 99.)[6]

[6] The opposition to certiorari states that Rachel Brawner did not have access to classified information (p. 10, n. 8). The answer of respondents admitted that Brawner and Baker "have no authorized access to classified information" (R. 94). In reply to an interrogatory designed to determine whether this admission was intended to imply that Brawner and Baker may have other than authorized access to classified information (R. 97), respondents stated: "Neither Brawner nor Baker have authorized access to classified information, however the defendants are unable to state whether or not Brawner or Baker have had access to any of the restricted areas on the premise of the Naval Gun Factory or whether Brawner or Baker have access to any classified information" (R. 99). In his testimony at the arbitration hearing, in answer to a question whether Rachel Brawner had access to classified information, Baker replied, "I hardly think so"; and in answer to the question whether he had access to classified information, Baker replied, "No, sir" (R. 68). As she testified at the arbitration hearing, Rachel Brawner's work at the cafeteria as a short order cook kept her fully occupied (R. 39-41), and she did not even know what went on in the two offices of the very building in which the cafeteria was housed (R. 39). Moreover, re-

III. The Attempt to Guess at the Reason for the Conclusion That Rachel Brawner Failed "to Meet the Security Requirements. . . ."

On November 15, 1956, immediately following her separation from employment, Rachel Brawner went directly to see Oliver T. Palmer, business agent of the Union, and reported to him what had transpired (R. 8, 42, 91). In her earlier conversation with Baker, Brawner had understood him to say that the question relating to her security clearance pertained to "something which happened in 1946" (R. 42). Accordingly, Palmer asked her to search her mind as to anything which might have happened in 1946 which might bear on her security (R. 42). At that time Brawner had been employed at Lansburgh's (R. 42), a department store in the District of Columbia. She recalled seeing the Daily Worker in another employee's possession at Lansburgh's (R. 42). Brawner then thought it was a "regular newspaper," "something like a Union would put out"; she later learned as a result of newspaper stories concerning the Rosenberg espionage case that it was a Communist paper (R. 43). As to the employee

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spondents merely say they "are unable to state" whether Brawner or Baker have other than authorized access to classified information or restricted areas; what they are unable to state they cannot assert. Finally, any implication that access to classified information consists in being at a location where such information exists is flatly in conflict with the United States Navy Security Manual for Classified Matter. Section 0206 of the Manual defines "classified matter" as "official information or material in any form or of any nature the safeguarding of which is necessary in the interest of national defense and which is classified for such purpose by responsible classifying authority." Section 0201 defines access to be the "ability and opportunity to obtain knowledge of classified matter. *An individual does not have access to classified matter merely by being in a place where such matter is kept*, provided the security measures which are in effect prevent him from gaining knowledge of such classified matter." (Emphasis supplied.)

in whose possession the paper was, Brawner did not then know, and does not now, whether she is a Communist; this employee never asked Brawner to engage in Communist activity or to join the Party (R. 43). This employee never discussed Communism, and all that Brawner knows of her in this connection is that she "saw her one day with a Daily Worker in her hand" (R. 43).

Actually it appears that Brawner misunderstood Baker's reference to 1946. As Baker testified at the arbitration hearing, he told Mrs. Brawner that a security investigation "could go back to 1945 or 1946, wherever you had your first job" (R. 64). He did not intend to suggest that anything did then transpire, for, as he testified, "I have no knowledge of anything relating to her within that time" (R. 65).[7]

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[7] In order to suggest that the determination that Rachel Brawner did not meet security requirements may have been based on other than loyalty-oriented reasons, the concurring opinion opines that "Mrs. Brawner might even have been personally insanitary in her food handling and had so become a risk" (R. 166, n. 5), and the opposition to certiorari mentions "being accident-prone" (p. 17). In the absence of a hearing based on a statement of reasons the multiplication of might-be's is as limitless as a lively imagination. But it is certain that Rachel Brawner was neither "insanitary" nor "accident-prone." For M & M has repeatedly stated that her employment record was completely satisfactory and she was above average in the discharge of her duties (R. 6, 27, 62, 90, 94); M & M "never had any question about her ability or qualifications . . . and there was no question about her work" (R. 62). This is not how an "insanitary" or "accident-prone" employee is evaluated. Furthermore, such reasons do not fall within the "security requirements" clause of Section 5(b)(iii) of the Concessionaire Agreement, but rather within the "not courteous, conscientious and competent to perform the duties" clause of Section 5(b)(ii), or the "fail to pass satisfactory medical examinations where the handling of food is involved" clause of Section 5(b)(i) (*supra*, pp. 4-5). To invoke the "security requirements" clause necessarily excludes any reasons comprehended by the first two clauses.

IV. Efforts to Secure Rachel Brawner's Restoration to Employment at the Bellevue Annex Cafeteria

At a meeting of representatives of M & M and the Union on November 20, 1956, and in ensuing correspondence between them, the Union protested that M & M's separation of Rachel Brawner was "without good and sufficient cause" and hence in violation of the collective bargaining agreement (R. 8-9, 20-21, 22-23, 45-48, 91). The Union repeatedly sought from M & M a statement of the reasons underlying the conclusion that Rachel Brawner did not meet security requirements (*ibid.*). M & M repeatedly replied that it did not know, and was unable to obtain from either the security officer or the superintendent of the Gun Factory, an elucidation of the underlying reasons (R. 8-9, 21-22, 23, 26-28, 46-47, 91). The Company took the position that its action was based on Section 5(b) (iii) of the Concessionaire Agreement (*ibid.*).

In connection with its attempt to secure a statement of reasons, the Union also requested that a meeting be arranged with officials of the Gun Factory at which to discuss the matter, and that a fair hearing be accorded Rachel Brawner (R. 9, 46-47, 91). On December 12, 1956, M & M wrote the Board of Governors of the Gun Factory Cafeterias to request "that a meeting be arranged . . . for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner" (R. 9, 25, 91, 95). But the superintendent of the Gun Factory refused to meet, stating that "the meeting proposed . . . would serve no useful purpose and is therefore unnecessary." Thus, on January 10, 1957, the Union was advised by M & M that (R. 9, 26-27, 91):

> We have been informed by the Superintendent, U.S. Naval Gun Factory via the Board of Gov-

> ernors, U.S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

This response was based on a memorandum to M & M from the Board of Governors, which enclosed a memorandum from the superintendent to the Board of Governors (R. 10, 59-60, 91, 100). The latter memorandum reads (*ibid.*):

> 1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M & M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner, a cafeteria employee.
>
> 2. Paragraph 5(b) iii of reference (b) [Agreement for Food Services Concessionaire] stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria employee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.
>
> 3. It is considered that the above decision is proper in this case and that *the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.* [Emphasis supplied.]

On January 30, 1957, the Union's attorney wrote to the superintendent of the Gun Factory to request the procedure and authority for the action taken against Rachel Brawner (R. 11-12, 31-32, 91, 95). This letter reads in part that (*ibid.*):

> We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/or other basis pursuant to which this determination was made.

The superintendent replied under date of February 27, 1957, stating in part that (R. 12, 32, 91, 95):

> The written agreement entered into by the Board of Governors, U.S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

Meanwhile, on January 11, 1957, the Union had invoked arbitration of the dispute under the terms of the collective bargaining agreement, claiming that M & M "discharged Rachel Brawner without good and sufficient cause" (R. 10-11, 29-30, 91). On April 17, 1957, the Union's attorney wrote to the superintendent of the Gun Factory to apprise him of the arbitration hearing to be held on May 2, 1957, and to state that (R. 12, 33-34, 91, 95):

> You are invited, personally or by a representative, to attend the hearing to state your position

and present evidence in its support relevant to your part, or that of your subordinates, in causing Mrs. Brawner's discharge.

No appearance was made either personally or by a representative (*ibid.*).

On August 6, 1957, after hearing, the Board of Arbitration, one member dissenting, held that "Rachel Brawner was not discharged without good and sufficient cause . . ." (R. 71). The majority based its conclusion on its view that (1) Rachel Brawner had not been discharged because M & M has " always said that her services were excellent and that they would put her back to work immediately if she could prevail on the government officials to restore her security badge" (R. 75),[8] and (2) the "real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully,

[8] Without giving any reasons the court below also concludes that Rachel Brawner was not discharged (R. 148, 159, 162). The basis for the conclusion eludes comprehension. After November 15, 1956, she no longer worked for M & M (R. 13, 90); she no longer received wages or other benefits from M & M (R. 13, 90); and this state of affairs was brought about by M & M's compliance with its promise contained in Section 5 (b) (iii) of the Concessionaire Agreement that it would "*In no event . . . continue to engage*, for operations under this agreement, personnel who . . . fail to meet security requirements . . . as determined by the Security Officer . . ." (*supra*, pp. 4-5, 6, 12, 13, 14; emphasis supplied). "Discharge normally means termination of the employment relationship or loss of a position." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286; see also, *Anderson* v. *Twin City Rapid Transit Co.*, 84 N.W. 2d 593, 598 (Minn.), and cases cited. That is what happened to Brawner. The employment relationship was terminated; she lost her position. M & M's expression of willingness to *rehire* Brawner if in the future she could secure an identification badge confirms rather than negatives her effective present severance from employment. If Rachel Brawner was not discharged, what was she?

she contends) denied her physical access to the place of her employment" (R. 76).[9]

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[9] Another Board of Arbitration in a similar context did not take so limited a view of its functions (R. 13-14, 91, *National Food Corp.*, 24 LA 567). In the latter case the Director of Security Division, Office of the Secretary of Defense, through the Department of Defense Concessions Committee, requested the employer, National Food Corporation, to discharge an employee, Esther Mae Thompson; Thompson worked in a cafeteria within the Pentagon operated by the employer; the ground for the request to discharge Thompson was the determination by the Director of Security Division that her security status was in question (*ibid.*). The Board of Arbitration held that Thompson's discharge was without "sufficient cause," and it ordered her reinstated with back pay (*ibid.*). In reaching this conclusion, the Board reasoned *inter alia* that (R. 13-14, 24 LA at 572):

> The Company contends that this Board of Arbitration is without power to review the determination of the Director of Security Division, Office of the Secretary of Defense, that Thompson was a security risk. This contention would be relevant if the Director were *authorized* to determine that an employee in Thompson's class was a security risk and to request the employee's discharge upon such determination. But the Company has not shown, and our independent search has not uncovered, any statute, executive order, or regulation authorizing the Director to act in the premises. The Company concedes that neither the Industrial Personnel and Facility Security Clearance Program, applicable to nongovernmental employees with access to classified information, nor the security requirements for government employment, applicable to government employees, have any relevance to an employee in Thompson's position. Not only do these programs not confer any authority on the Director with respect to an employee in Thompson's position, but by not conferring any such authority they negate the existence of the authority assumed by the Director. It is significant that the very safeguards accorded nongovernmental employees with access to classified information or accorded governmental employees by these programs would have prevented just the summary action to which Thompson, *a nongovernmental employee with no access to classified information*, was subjected. [Emphasis in original.]

Following this award, Thompson was reinstated, with back pay, and she continues to date to work in the cafeteria in the Pentagon (R. 13-14, 52-53, 91).

No member of the Board of Arbitration doubted the injustice done Rachel Brawner. The Chairman stated at the arbitration hearing that (R. 69-70):

> . . . what opportunity did this woman have to state her case or to obtain any information, or get any clarification of the reason for the picking up of her badge, which is of course the pivotal or crucial step in this whole proceeding?
>
> All she was told was "surrender your badge," and despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her.
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> * * *
>
> Not only was there no hearing or no clarification or no specification, but not even a statement on which the ultimate conclusion was reached. It was just said that she was not satisfactory from a security standpoint, which may mean anything.

And M & M's designee on the Board of Arbitration stated at the hearing that: "Our position is heartily in accord with the viewpoint of the Union on this, and we are in entire agreement and we hold no brief for the Security Officer's actions . . ." (R. 70).

V. Proceedings in the District Court and Events Transpiring After the Filing of the Complaint

Thereafter, on September 6, 1957, petitioners filed a complaint in the United States District Court for the District of Columbia against respondents and M & M (R. 2-18). Following answers and responses to interrogatories (R. 89-103), petitioners moved for summary judgment on February 8, 1958 (R. 103), and respondents on February 27, 1958 moved to dismiss the complaint, or, in the alternative, for summary judgment in their favor (R. 103).

Meanwhile, the Concessionaire Agreement between M & M and the Board of Governors of the Gun Factory Cafeterias, which expired on January 31, 1958, was not renewed, and since February 1, 1958, the cafeterias have been operated by a newly formed corporation known as Inplant Foods Incorporated (R. 107, 124). The two officers of Inplant are Harold R. Baker, President and Treasurer, who had been supervisor of the cafeterias operated by M & M at the Gun Factory, and Claude S. Breeden, Jr., Vice-President and Secretary, who had been secretary of M & M (R. 124).

On January 16, 1958, a conference was held between Baker and Breeden, on the one hand, and P mer and Bea, respectively business agent and president of the Union, on the other (R. 124). At this conference Palmer and Bea were informed that Inplant was taking over the operation of the cafeterias on February 1, 1958 (R. 124). The remainder of the conference was devoted to discussing and reaching agreement upon the status of the Union, the existing collective bargaining agreement, and Rachel Brawner (R. 124). Inplant recognized the Union as the exclusive bargaining representative of the employees working at the cafeterias of the Gun Factory; it assumed all the obligations of the collective bargaining agreement; and it agreed to reinstate Rachel Brawner should petitioners prevail in the pending suit (R. 124-130). The agreement pertaining to Brawner is that (R. 125, 127, 128):

> The new company will reinstate Mrs. Rachel Brawner with retroactive seniority rights, and further accumulation thereafter, if, as a result of the pending suit in the United States District Court by the Union against certain government officials and M & M Restaurants, Inc. it is held

> in effect that M & M Restaurants, Inc. or said government officials acted without legal authority. The new company shall, however, not be liable for back pay, except for back pay accruing after any breach by it of its refusal [*sic*, promise] to reinstate Mrs. Brawner as required by this paragraph.

The District Court thereafter entered an order without opinion dismissing the complaint (R. 132).

VI. The Decision of the Court of Appeals

The ensuing appeal was heard by a division of the Court of Appeals composed of Judges Edgerton, Fahy, and Danaher. After argument of the appeal, this Court decided *Greene* v. *McElroy*, 360 U.S. 474. Upon the authority of that decision, the division of the Court of Appeals reversed, Judge Danaher dissenting. Judge Edgerton in his opinion stated in part that (R. 135):

> On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, " in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474. What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

A petition for rehearing en banc was granted (R. 139). A new majority, by a five to four vote, reversed the decision of the division, and affirmed the judgment

of the District Court (R. 182). The essence of the opinion of the new majority is that (1) governmental officers have unfettered power to control access to federal property, and that (2) Rachel Brawner, as a cook, could work elsewhere, and was therefore not totally debarred from employment (R. 144-164). Judges Edgerton and Fahy adhered to their earlier position (R. 175-181), and they were joined in dissent by Judges Bazelon and Washington, the latter stating that "We agree with Judges Edgerton and Fahy that the case must be reversed on the authority of *Greene* v. *McElroy*" (R. 181).[10]

SUMMARY OF ARGUMENT

I

Greene v. *McElroy*, 360 U.S. 474, controls. Respondents assert the authority, at least where the place of civilian nongovernmental employment is on federal property, to cause a civilian nongovernmental worker to lose her private employment on security grounds and otherwise injure her, without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. This Court in *Greene* v. *McElroy* held that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). Unlike William Greene who had at least a limited hearing, Rachel

[10] The Court of Appeals unanimously affirmed the dismissal of the complaint against M & M (R. 136, 162). Certiorari to review this disposition has not been sought.

Brawner had no hearing at all; and unlike William Greene who did have access to classified information, Rachel Brawner had no access to classified information. Since a limited hearing was an unauthorized basis for causing an employee with access to classified information to lose his job "in the absence of *explicit authorization* from either the President or Congress," it follows *a fortiori* that neither the President nor Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all with respect to an employee without any access to classified information.

II

In this case respondents acted without even internal *departmental* authority, much less did they possess executive or congressional sanction for their conduct.

A. The regulations of the Department of Defense, both before and after this Court's decision in *Greene* v. *McElroy*, confine the security program to private employers and private employees who have access to classified information. All others in private employment are to be let alone. As to those with access to classified information, the regulations afford a limited hearing to the affected employee, and since *Greene* v. *McElroy* as a result of executive direction the limited hearing includes a limited opportunity to cross-examine.

Yet respondents in this case presumed to decide that Rachel Brawner did not meet the "security requirements" with no notice, no specification of reasons, no opportunity to answer or be heard, and no standards. And they assert this power to act summarily despite the fact that they concede that, had Rachel Brawner had access to classified information, she would have been

entitled to these safeguards. For, in their opposition to certiorari, they state, referring to "civilians employed on military bases by private contractors" (p. 10), that "employees who, unlike petitioner, have access to classified information . . . generally come within the Industrial Security Program to which the *Greene* case applied . . ." (p. 10, n. 8). Thus respondents denied Rachel Brawner, who had no access to classified information, even the safeguards of a limited hearing which they agree is vouchsafed to employees with access to classified information. It turns things upside down for respondents to assert, as they must and do, that they had departmental authority to accord no hearing to an employee who had no access to classified information, when by their own regulation they were required to accord at least a limited hearing to an employee with access to classified information. The true teaching is that employees who do not have access to classified information are to be let alone.

B. Rachel Brawner worked in private employment as a short order cook under a collective bargaining agreement which safeguarded her from discharge or suspension "without good and sufficient cause." The equivalent to this status in governmental employment is a position within the competitive civil service. It is therefore pertinent to observe that, had Rachel Brawner worked in this equivalent status as a short order cook in the cafeteria of the Gun Factory as a governmental employee, respondents could not have summarily discharged her. When federal officers presume to act towards private employees in a way alien to the laws protecting governmental employees, the assertion of such authority is heavily suspect. For it is unthinkable that the Government through any of its organs would show less scrupulous concern to safe-

guard the interests of persons in private employment, towards whom it owes a duty to refrain from "illegal interference or compulsion" in the exercise of the "right to earn a livelihood and to continue in employment unmolested,"[11] than it manifests towards its own employees, over whom it can assert plenary authority within constitutional limits.[12]

C. To establish departmental authority, respondents invoke administrative materials, not published in the Federal Register, in accordance with which, they state, Rachel Brawner had the status of a "visitor" to the Gun Factory, and the "commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted" (*infra*, p. 46). The short answer is that Rachel Brawner was not a visitor to whom the visitor control procedures are applicable. Indeed, the Navy Security Manual for Classified Matter, upon which respondents principally rely, negates any authority to treat Rachel Brawner as a visitor. That manual separately identifies persons like Rachel Brawner as "contractors' employees" or "contractor personnel." For the security procedures pertinent to such personnel the manual directs reference to the Armed Forces Industrial Security Regulation. This regulation requires that personnel security clearance of contractors' employees, if it is not to be granted, shall be referred "to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation" (*infra*, p. 52). And the upshot of the latter regulation is that an employee with no access to classified information is to be let alone, and an employee with

[11] *Truax* v. *Raich*, 239 U.S. 33, 38.

[12] See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100.

access to classified information is to be given at least a limited hearing. Thus the very manual invoked by respondents negatives any departmental authority to deprive a private employee of his job on security grounds without a hearing of any kind.

In any event, since none of the administrative material upon which respondents rely was published in the Federal Register as required by Section 3(a) of the Administrative Procedure Act, respondents' action was unauthorized upon this independent ground.

D. By Section 5(b)(iii) of the Food Services Concessionaire Agreement, the employer had contracted not to "engage, or continue to engage, for operations under this Agreement, personnel who . . . fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity." Respondents do not dispute that this agreement does not constitute a valid source of authority. Authority which does not exist in the absence of the agreement cannot be conferred by it. All that the agreement does is to reduce to writing the arrogation of authority never granted. Moreover, the agreement is invalid because in conflict with the National Labor Relations Act. That Act "makes it the duty of the employer to bargain collectively with the chosen representative of his employees. The obligation being exclusive, . . . it exacts 'the negative duty to treat with no other.' "[13] Section 5(b) of the Concessionaire Agreement is the product of the employer's violation of his statutory duty "to treat with no other" than the Union "in respect to rates of

[13] *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-684.

pay, wages, hours of employment, or other conditions of employment."

E. If respondents had departmental authority to act, it is void for lack of executive or congressional sanction. No executive authority is claimed or exists. The statutes urged in this case to establish congressional authority to act without any hearing at all are less substantial than the statutes which in *Greene* v *McElroy* were held not to establish authority to act on the basis of a limited hearing. And to say that the administrative assumption of power asserted in this case has been delegated by the President or Congress is to say that they have authorized federal officers to do as they please. To place such unchannelled and ungoverned power in the hands of an official is itself an invalid delegation of authority.

III

Respondents' action is unconstitutional if authorized. The axe fell on Rachel Brawner without notice, without explication of what the security requirements constitute, without a statement of reasons particularizing the respects in which she allegedly failed to meet them, without an opportunity to answer, without presentation of the evidence against her, and without presentation of evidence on her behalf. The only alternative to saying that Rachel Brawner was denied due process is to say that she is entitled to none.

Respondents' action conflicts with the First Amendment as well as the Fifth. Under the regime of absolute governmental power manifest by this case the only safety of the citizen against official oppression—if he is safe even then—is to speak only banalities, to read or write only commonplaces, and to associate with none

about whom an eyebrow could be raised. Anything less than unrelieved anonymity exposes the individual to the risk of governmental condemnation as a security risk without even the right to know the why or the where, much less to defend. In this environment every value that the First Amendment is designed to protect against governmental abridgment would perish.

IV

Rachel Brawner was sufficiently injured by the unauthorized and unconstitutional action taken against her to complain. She lost her job as a cook which she had held for six and one-half years; however comparable any other job may be that she may secure elsewhere, she must start at that new employment with zero seniority, so that she has permanently lost the seniority protection drawn from six and one-half years' service; her employment opportunities generally have been sharply curtailed; and her reputation has been sullied. And so *Greene* v. *McElroy* cannot be distinguished upon the ground that William Greene was hurt but Rachel Brawner was not. Both suffered enough, and it is an almost insulting irrelevancy to ask who suffered more.

Nor can *Greene* v. *McElroy* be distinguished upon the ground that William Greene worked on private property while Rachel Brawner worked on federal property. Were this to make the difference it would follow that, had William Greene worked on federal property, his employment could have been destroyed and his reputation besmirched with no hearing at all, via the power to control access to governmental land. But it is not true that authorization for acts done by a governmental official is unnecessary if the acts are per-

formed on land owned and occupied by the sovereign. And it is not true that the Constitution stops at the entrance to a Navy installation. Federal ownership of the premises on which the Gun Factory is located does not mean that officials may destroy the employment and sully the name of persons working within the grounds. Within our scheme of limited powers, federal officers are not lords of the manor empowered to do as they will.

ARGUMENT

Respondents Acted Without Authority in Causing Petitioner Rachel M. Brawner to Lose Her Job at the Cafeteria, in Impairing Her Opportunity for Employment Elsewhere, and in Besmirching Her Reputation; if Authorized, the Action is Unconstitutional

I. INTRODUCTION; GREENE v. McELROY

The uncontroverted facts are stark and bare. Respondent Tyree, superintendent of the Naval Gun Factory, and Respondent Williams, security officer of the Naval Gun Factory, made a unilateral determination that Petitioner Rachel M. Brawner "does not meet . . . security requirements [for admission to the Gun Factory] and therefore entrance privileges to the Naval Gun Factory have been revoked" (*supra*, p. 13). In reaching this conclusion, no hearing was accorded Brawner, the officers taking the position that even a "meeting to discuss the action . . ." would serve no useful purpose and is therefore unnecessary" (*supra*, p. 13). When Brawner's identification badge was turned over to the security officer, he gave no reason for his action, except to say he would not permit her to continue to retain the badge because her security status was in question. Neither before, then, nor there-

after did the security officer or any other official give any explanation for this conclusion to either Brawner, the Union, or the employer (*supra*, p. 8). Indeed, there was not even disclosure of what the security requirements constitute, much less particularization of the respects in which Brawner allegedly failed to meet them. As a result of this action, Brawner lost her job at the cafeteria, her opportunity for employment elsewhere was impaired, and her reputation was besmirched.

Respondents thus assert the authority, at least where the place of civilian nongovernmental employment is on federal property, to cause a civilian nongovernmental worker to lose her private employment on security grounds and otherwise injure her, without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. To stand, respondents' action must be supported by valid authority, for it is fundamental that no "Federal officer" may act "in excess of his authority or under an authority not validly conferred." *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 620. Action in the name of security is no exception to the rule. *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 140. On the contrary, it is the occasion for its stringent application. This Court has invalidated a governmental employee's removal and debarment from federal employment on the ground of a reasonable doubt as to his loyalty because the action taken against him was in excess of the authority conferred by the relevant executive order. *Peters* v. *Hobby*, 349 U.S. 331; *Service* v. *Dulles*, 354 U.S. 363. It has stricken down

an executive order regulating retention of federal employment because the security standards prescribed by that order were not authorized by the relevant statute. *Cole* v. *Young*, 351 U.S. 536. It has ordered the reinstatement of a governmental employee to his job because his discharge for security reasons did not comply with the regulation pursuant to which it was effected. *Vitarelli* v. *Seaton*, 359 U.S. 535. And it has invalidated a private employee's revocation of security clearance, which caused him to lose his job, because the regulation on which it was based prescribed a procedure unauthorized by either legislative or executive sanction. *Greene* v. *McElroy*, 360 U.S. 474.

This Court has thus enjoined a tight test of authority in this field. It has firmly established that, if employment is to be governed by security requirements, the authority must be explicitly stated, and will not be enlarged upon by implication.[14] Particularly in the field of loyalty and security, where a "'badge of infamy' attaches" to the affected employee and where "substantial rights affecting the lives and property of citizens are at stake", (*Peters* v. *Hobby*, 349 U.S. 331, 347), scrupulous confinement of federal officers to only such authority as is unambiguously conferred is required.

In this case this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, is the short answer to respondents' claim that their action was authorized. Rachel Brawner, like Wiliam Greene, was a private employee of a private employer. As explained in the Navy Civilian Personnel Instructions, quoted by respondents

[14] Compare, in directly related contexts, *Harmon* v. *Brucker*, 355 U.S. 579, 581-583; *Kent* v. *Dulles*, 357 U.S. 116, 128-130.

in their brief below at pages 16-17, "The services operated by concessionaires are classed as private enterprises; they acquire none of the status of a government instrumentality and *their employees have the same legal status as do employees of any private employer.*" (Emphasis supplied.) This Court in *Greene* v. *McElroy* decided the status of an employee of a private employer whose employment was adversely affected by the Secretary of Defense or his subordinates on security grounds. It held that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). Unlike William Greene who had at least a limited hearing, Rachel Brawner had no hearing at all; and unlike William Greene who did have access to classified information, Rachel Brawner had no access to classified information (*supra*, p. 9 and n. 6). Since a limited hearing was an unauthorized basis for causing an employee with access to classified information to lose his job "in the absence of *explicit authorization* from either the President or Congress," it follows *a fortiori* that neither the President nor Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all with respect to an employee without any access to classified information.

Nevertheless, the court below held, as respondents claim, that "the authority dealing with entrance upon naval installations . . . is clear and ample" and sufficiently supports respondents' action (R. 163). We shall therefore show first that in this case respondents' conduct is devoid even of *departmental* authorization.

much less explicit executive or congressional sanction (*infra*, pp. 31-76). We shall next show that, if authorized, respondents' action is unconstitutional; it satisfied neither the prescript of rudimentary fair play ordained by the Fifth Amendment (*infra*, pp. 77-84), nor the right to speak, think, and associate freely prescribed by the First Amendment (*infra*, pp. 84-86). We shall finally show that respondents cannot escape answerability for their unauthorized and unconstitutional conduct by their claim that Rachel Brawner was not sufficiently injured by it (*infra*, pp. 87-97), nor by their claim that the governmental ownership of the land on which they acted absolutely licenses what they did (*infra*, pp. 97-103).

II. RESPONDENTS ACTED WITHOUT AUTHORITY

A. THE SECURITY PROGRAM IN PRIVATE EMPLOYMENT: INDUSTRIAL PERSONNEL SECURITY REVIEW REGULATION; EXECUTIVE ORDER NO. 10865; INDUSTRIAL PERSONNEL ACCESS AUTHORIZATION REVIEW REGULATION

1. The Industrial Personnel Security Review Regulation was in effect at the time of the action taken against Petitioner Rachel Brawner. Adopted on February 2, 1955, this regulation was promulgated by the Secretary of Defense upon the recommendation of the Secretaries of the Army, Navy, and Air Force, and it prescribed the procedures for the security clearance of persons in private employment. 32 CFR, 1960 Cum. Supp., Part 67. It was this regulation which was before this Court in *Greene* v. *McElroy*, 360 U.S. at 494, n. 23, and which this Court invalidated for want of executive or congressional authority to dispense with the safeguards of confrontation and cross-examination.

This regulation represented the *departmental* view of the limitations within which the Department of

Defense meant to regulate private employment upon the basis of security requirements. The Department undertook in this regulation to demarcate the area within which and the means by which it chose to have its officers act, and conduct by its officers which did not conform with the regulation was devoid of internal departmental authority. Accordingly, while the Department sought to go farther than its authority extended, its officers were at the least bound not to go beyond what the regulation prescribed. Viewed in this light, respondents in this case transgressed even the limitations of departmental authority, for they entered an area which the regulation had closed to them and they employed means which the regulation did not permit in the area which was open. Thus:

(a) The regulation confined the security program to private employers and private employees who have access to classified information. As Section 67.1-1 states: "This part prescribes the uniform standard and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth herein, *to have access to classified defense information.*" (Emphasis supplied.) See also *id.* §§ 67.1-2(c), 67.1-6(a)(1-3).

Petitioner Rachel Brawner had no access to classified information (*supra*, p. 9 and n. 6).[15] Under the

[15] The attempt of the court below to suggest that Rachel Brawner may indeed have been privy to classified information is revealing. It states: "A naval installation such as a gun factory is in and of itself a confidential matter of highest priority, and many of its vital features are observable by anyone on the premises" (R. 160). This is a security concept which even the Department of the Navy disclaims. Section 0201 of the United States Navy Security Manual for Classified Matter states that: "*An individual does not have access to classified matter by being in a place where*

regulation person like Rachel Brawner who have no access to classified information are to be let alone. "The right to be let alone is indeed the beginning of all freedom." [16] The regulation embodied this right vis-a-vis private employees who do not have access to classified information. Officers who disregard this right exceed their internal departmental authority.

(b) Even if the security program were applicable to Rachel Brawner—that is, even if she had access to classified information—it is plain that the procedures specified by the regulation to determine security clearance negative the power which respondents in this case presumed to exercise.

(*i*) Section 67.3-1 of the regulation provides that "Clearance shall be denied or revoked if it is deter-

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such matter is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified matter." (Emphasis supplied.) We presume that respondents do not assert that the security measures at the Gun Factory are not adequate to keep a cook from acquiring information she should not have. But it would make no difference even if it were true that Rachel Brawner had access to classified information. For she would then be entitled at least to the safeguards of the regulation, which was itself defective because it dispensed with confrontation and cross-examination.

[16] Mr. Justice Douglas dissenting in *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, 467. See also, Mr. Justice Brandeis dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

mined, on the basis of all the available information, that access to classified information by the person concerned is not clearly consistent with the interests of the national security." [17] Section 67.3-2 thereafter elaborates the criteria to be evaluated in making this determination. The regulation does not, as section 5(b)(iii) of the Food Services Concessionaire Agreement presumes to permit (*supra*, p. 5), authorize any federal officer to formulate his own undisclosed concept of "security requirements."

(*ii*) Section 67.4-1 of the regulation provides that "activities of military departments *will not deny* a clearance to a contractor or a contractor employee, and *ordinarily will not suspend* a previously granted clearance," except that, "in *exceptional cases* officials authorized by the military department concerned may suspend a clearance previously granted to a contractor employee . . . when, in the opinion of the authorized official, the contractor employee's continued access to classified information, *pending action by the Screening Board, will constitute an immediate threat to the security interests of the United States.*" (Emphasis supplied.) Thus, the only summary power conferred upon a security officer is to suspend clearance where an *immediate threat to security* is involved, and even then his action is *interim only* pending action by the Screening Board. In this case, it could hardly be suggested that Rachel Brawner's continued service as a short order cook constituted an immediate threat to the security interests of the United States. If it did, the regulation required further investigation and adjudication by others to secure a final determination

[17] This section was modified in a presently immaterial way on April 30, 1959. 24 Fed. Reg. 3367.

of her status. The regulation conferred no authority upon a security officer to snuff out the economic life of any employee without more ado than his own say-so.

(*iii*) Except for the power of summary suspension pending action by the Screening Board where an immediate threat to security is concerned, a security officer's only authority is to "forward to the Director" of the Office of Industrial Personnel Security Review "all cases prescribed in paragraph (a) of 67.1-6, together with the complete file, including the recommendations in the case, the reasons therefor, and all other available information and material relevant to a determination in the case." § 67.4-2. The Director on receipt "will forward it to the Screening Board for appropriate action." *Ibid.* The Screening Board, after investigation and review, will either grant, continue, or suspend security clearance. § 67.4-3(a-e). "If the Screening Board concludes . . . that the case does not warrant a security finding favorable to the person concerned, it will prepare a Statement of Reasons. The Statement of Reasons will be as specific and in as great detail as, in the opinion of the Board, security considerations permit, in order to provide the person concerned with sufficient information to enable him to prepare his defense." § 67.4-3(e).

The person is afforded an opportunity to answer, to submit evidence, and, at his request, to have a hearing. § 67.4-3(f). If the person does not reply, his clearance is finally denied or revoked (§ 67.4-3(g)(3)); if he does reply but does not request a hearing, the file is transmitted either to the Hearing Board or to the Review Board for determination (§ 67.4-3(g)(2)); if he requests a hearing, the file is transmitted to the Exec-

utive Secretary of the Hearing Board (§ 67.4-3(g)(l)). A hearing will thereafter be held, "designed to accomplish two major purposes: (1) to permit the person concerned to present evidence in his own behalf and (2) to ascertain all the relevant facts in the case to aid in reaching a fair and impartial determination." § 67.4-5(a). It is said that "every possible safeguard within the limitations of national security will be provided to ensure that no contractor or no contractor employee will be denied a clearance without an opportunity for a fair hearing." § 67.1-3(a). The Hearing Board thereafter determines whether or not the granting of clearance is clearly consistent with the interests of the national security. § 67.4-6(e). The determination "shall include a finding with respect to each of the allegations set forth in the Statement of Reasons" and a "detailed discussion" of the evidence relied upon to support the finding. § 67.4-6(d). And in making the determination (§ 67.4-6(b)):

> The Board will take into consideration the fact that the person concerned may have been handicapped in his defense by the non-disclosure to him of classified information or by his lack of opportunity to identify or cross-examine persons constituting sources of information. Accordingly, it will weigh each item of derogatory information carefully in the light of its recency and relative seriousness, the amount and quality of supporting evidence, the attendant circumstances, whether the item was given under oath or affirmation, whether or not it is relevant to the Statement of Reasons, and whether or not the person concerned has had an opportunity to rebut it.

The determination by the Hearing Board is in some circumstances final and in other circumstances sub-

ject to further consideration by the Review Board. § 67.4-7. The determination by the Review Board is itself subject to "Reversal by the Secretary of Defense, or reversal by the joint agreement of the Secretaries of the three military departments at the request of one of such Secretaries." § 67.4-8(c)(3).

The contrast between the authorized procedure for denying or revoking security clearance to a person in private employment and the action taken by respondents against Rachel Brawner could not be more glaring. Respondents in this case presumed to pronounce final judgment with no notice, no specification of charges, no opportunity to answer or be heard, and no standards. The First Annual Report of the Industrial Personnel Security Review Program discloses that about 60 percent of the cases referred by security officers result in the grant of clearances pursuant to the procedures prescribed by the regulation.[18] There

[18] First Annual Report, Industrial Personnel Security Review Program, 3 (1956):

> To summarize the scope of operations, during the year beginning in July 1955 and ending July 31, 1956, 418 cases were considered under the program after being referred to the Director, Office of Industrial Personnel Security Review, by the three Services with a recommendation that clearance be denied or revoked. Of this number, after careful consideration, and after clarifying the available information where necessary, the Screening Board was able to conclude that a clearance should be issued in 250 cases.
>
> In the remaining 168 cases, the Board concluded that a clearance was not warranted and issued a Statement of Reasons. The individuals concerned elected to default in 45 cases, and final denials were issued in accordance with the Regulation.
>
> Fifty-one cases were decided by Board action during the year, and after careful examination in the Director's Office, 31 final denials were issued. Clearance of access to classified defense information was directed in the other 20 cases.

is no internal departmental authority lic[illegible]ing the security officer or the superintendent of the Gun Factory to make an *ex parte* determination which experience has shown results in a 60 percent incidence of error.

(*iv*) Denial of security clearance does not require discharge of a nongovernmental employee. Section 67.1-3(b) of the regulation provides that: "Since a clearance relates only to access to classified defense information, the denial or revocation of a clearance to a contractor or contractor employee does not preclude his participation in unclassified work." As stated in the First Annual Report, Industrial Personnel Security Review Program, 11-12 (1956):

> One further area deserves mention in this report. Our experience over the past year indicates that a few Department of Defense contractors have been unnecessarily harsh in treating adverse decisions at any level as grounds for dismissal, rather than as a mandate to limit such an employee's access by transfer, another job, or in other ways.
>
> The situation is complicated by the delicate position of the Department of Defense when it enters into the relations between a contractor and its employee, a matter in which the Department, although it has great concern, has no right to intrude itself.
>
> We have at least an educational role to play under these circumstances, however, and we have taken steps to carry out that role. Conferences have been held between various segments of industry and Government officials interested in industrial security. These conferences, with their interchange of viewpoints, are useful and are being continued.

Education should begin closer at home. In the light of a regulation which states that denial of clearance "does not preclude . . . participation in unclassified work," there cannot be the slightest departmental authority for causing Rachel Brawner to lose her job as a short order cook in a cafeteria.

2. Subsequent to this Court's invalidation of the Industrial Personnel Security Review Regulation, the President on February 20, 1960, issued Executive Order No. 10865, prescribing the procedure to be used in determining whether authorization for access to classified information should be denied or revoked. 25 Fed. Reg. 1583. By this order the President has required the Secretary of Defense and other enumerated department heads to afford the applicant a hearing, including with certain limitations "an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue . . . " (Sec. 4(a)). Thereafter, on July 28, 1960, pursuant to this executive order the Department of Defense promulgated the Industrial Personnel Access Authorization Review Regulation, and cancelled the Industrial Personnel Security Review Regulation. 25 Fed. Reg. 7523. The new regulation incorporates the limited requirement of cross-examination (Sec. IV(E)(2)), but does not otherwise materially alter the procedure prevailing under the preceding regulation.

3. The upshot is that the Department of Defense regulations, both preceding and following this Court's decision in *Greene* v. *McElroy*, accord a private employee with access to classified information at least a limited hearing to determine his security status when it is brought into question, and since *Greene* v. *McElroy* by executive requirement the hearing includes at least

a limited opportunity for cross-examination.[19] Yet respondents in this case presumed to decide that Rachel Brawner did not meet the "security requirements" with no notice, no specification of reasons, no opportunity to answer or be heard, and no standards. And they assert this power to act summarily despite the fact that they concede that, had Rachel Brawner had access to classified information, she would have been entitled to these safeguards. For, in their opposition to certiorari, they state, referring to "civilians employed on military bases by private contractors" (p. 10), that "employees who, unlike petitioner, have access to classified information . . . generally come within the Industrial Security Program to which the *Greene* case

[19] The limitations are significant and we do not suggest that the limited opportunity satisfies the right to confrontation and cross-examination. For example, the statement of a "confidential informant" may be received without cross-examination if the department head certifies that "disclosure of his identity would be substantially harmful to the national interest" (Executive Order No. 10865, 25 Fed. Reg. 1583, Sec. 4(a)(1)); and the statement of any person may be received without cross-examination if the department head or his designee determines that the statement is "reliable and material," that not to receive it would be "substantially harmful to the national security," and that "the person who furnished the information cannot appear to testify" due to unavailability or "some other cause determined by the department head to be good and sufficient" (Sec. 4(a)(2)). The right to confrontation and cross-examination means that the proponent of evidence must choose between full disclosure and not tendering it at all. *United States* v. *Coplon*, 185 F. 2d 629, 638 (C.A. 2), cert. denied, 342 U.S. 920; *In re Burke*, 87 Ariz. 336, 351 P. 2d 169, 172, *infra*, pp. 82-83. Nor is the department head's private determination a satisfactory alternative to full disclosure. "That a conclusion satisfies one's private conscience does not attest its reliability. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness." Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 171.

applied . . .'' (p. 10, n. 8). Thus respondents denied Rachel Brawner, who had no access to classified information, *even the safeguards of a limited hearing* which they agree is vouchsafed to employees with access to classified information. It turns things upside down for respondents to assert, as they must and do, that they had departmental authority to accord no hearing to an employee who had no access to classified information, when by their own regulation they are required to accord at least a limited hearing to an employee with access to classified information. If any such distinction were intended, it is so indefensibly invidious as to constitute in itself a denial of the equal protection of law. The true teaching is that employees who do not have access to classified information are to be let alone.

To this all that the court below states is that the "case does not involve any Personnel Security Program, with its concomitant regulations" (R. 148). But the regulations are involved in the crucial sense that their purport is that employees not subject to its procedures are to be let alone. They are also vitally involved in that the summary action prohibited by the regulations as to employees covered by them cannot possibly be thought to be an authorized procedure as to employees not covered, particularly when the covered class does have access to classified information and the exempt class does not. To say that this case does not "involve" the regulations is like saying that a regulation which confines a fisherman to a daily catch of seven bass no less than ten inches long during the open season does not prohibit him from catching an unlimited number of bass of smaller size during the closed season.

B. STATUTORY PROTECTION OF FEDERAL GOVERNMENTAL EMPLOYMENT: THE ACT OF AUGUST 26, 1950; THE LLOYD-LA FOLLETTE ACT; AND THE VETERANS' PREFERENCE ACT

Rachel Brawner worked in private employment as a short order cook under a collective bargaining agreement which safeguarded her from discharge or suspension "without good and sufficient cause" (*supra*, p. 4). The equivalent to this status in governmental employment is a position within the competitive civil service. It is therefore pertinent to observe that, had Rachel Brawner worked in this equivalent status as a short order cook in the cafeteria of the Gun Factory as a governmental employee, respondents could not have summarily discharged her. And as the "liberty [of persons in private employment] to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job" (*Parker* v. *Lester*, 227 F. 2d 708, 717 (C.A. 9)), it is impossible to imagine that respondents are authorized to act towards private employees of another in a manner which is not tolerated with respect to governmental employees.

Thus, as to civilian governmental employees, Congress has by statute (64 Stat. 476, 5 USC § 22-1) provided that the Secretary of the Navy, among other enumerated agency heads, may in the interest of national security suspend any civilian officer and employee, but with two important provisos. First:

> *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated

by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final.

And second:

Provided further. That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head.

This statute is applicable only to governmental employees who occupy "sensitive" positions affecting the "national security"; its authority does not extend to all positions. *Cole* v. *Young*, 351 U.S. 536.

Accordingly, as a governmental employee, Rachel Brawner could not have been summarily discharged under this statute for failing to meet "security requirements." First, it is hard to imagine a position less "sensitive" than that of short order cook, so that she would not be subject to suspension or discharge under the statute at all. Second, even if applicable, she would at the least have been entitled to notification of the reasons for suspension, an opportunity to submit statements or affidavits in response, and a decision based upon review of her response before the suspension was converted to a discharge. This minimum must be extended to *any* employee unless the "agency head determines that the interests of the national security" do not permit, and no such determination could in conscience be made in a situation like Rachel Brawner's. Third, were Rachel Brawner in the competitive civil service, she would be entitled to the additional enumerated procedural safeguards, including a hearing, before she was terminated.

This statute aside, as a governmental employee in the competitive civil service—the governmental equivalent to her protected private employment— Rachel Brawner's retention of employment would have been governed by the Lloyd-LaFollette Act.[20] She could not be removed or suspended "except for such cause as will promote the efficiency of such service and for reasons given in writing," and only upon compliance with the following procedure:

> Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be

[20] § 6, 37 Stat. 555, as amended, 5 USC § 652.

allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay.

A summary discharge for an unparticularized failure to meet "security requirements" could not stand.[21] And, were Rachel Brawner a veteran, she would have had the additional right of answering the charges "personally," with the right to appeal an adverse decision to the Civil Service Commission, including "the right to make a personal appearance" before the Commission.[22]

These laws are not to be read as if they were a grudging exception to the spoils system. They embody a policy which is of the essence of personnel administration in the modern civil service. And so, when federal officers presume to act towards private employees in a way alien to the genius of the laws protecting governmental employees, the assertion of such authority is heavily suspect. For it is unthinkable that the Government through any of its organs would show less scrupulous concern to safeguard the interests of persons in private employment, towards whom it owes a duty to refrain from "illegal interference or compulsion" in the exercise of the "right to earn a livelihood and to continue in employment unmolested,"[23]

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[21] *E.g.*, *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A.D.C.).

[22] Veterans' Preference Act, § 14, 58 Stat. 390, as amended, 5 USC § 863.

[23] *Truax* v. *Raich*, 239 U.S. 33, 38.

than it manifests towards its own employees, over whom it can assert plenary authority within constitutional limits.[24]

C. THE ADMINISTRATIVE MATERIALS INVOKED BY RESPONDENTS TO SHOW AUTHORITY

We turn now to consider the material relied upon by respondents to show departmental authority for the action taken against Rachel Brawner.

1. The United States Navy Security Manual for Classified Matter

The United States Navy Security Manual For Classified Matter was promulgated on October 2, 1954.[25] Respondents invoke Chapter 14 of the manual, entitled "Visitor Control." The essence of their position is that Rachel Brawner is a "visitor" to the Gun Factory, and in accordance with Section 1409(1) of the manual, "The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted." We shall show that Rachel Brawner is not a "visitor" to the Gun Factory within the meaning of the "visitor control" procedure of Chapter 14, and that independently of Chapter 14, Chapter 15 of the manual, entitled "Personnel Security Investigations And Clearances For Access To Classified Matter," negatives the authority asserted by respondents to treat Rachel Brawner as if she were a "visitor."

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[24] See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100.

[25] This manual was on March 10, 1958, superseded by another of the same name and substantially identical tenor. We assume that these manuals, and other administrative materials upon which respondents rely, will be made available in their entirety to the Court by respondents. None of the manuals or other materials are published in the Federal Register. See *infra*, pp. 58-65.

(a) To presume that the procedures for "Visitor Control" are applicable requires the assumption that Rachel Brawner is properly identified as a "visitor." Plainly she is not. For the full six and one-half years before her discharge on November 15, 1956, except for vacations, holidays, and very infrequent absences, Brawner worked everyday at the Bellevue Annex Cafeteria, Monday through Friday, from 6:00 a.m. to 3:00 p.m. (R. 6, 39-41, 90, 123). It is a perversion of language to describe her as a visitor or her attendance within the Gun Factory as a visit.[26]

(b) The Gun Factory itself does not describe persons in Rachel Brawner's position as "visitors." Instead such a person is known as a "sponsored employee" (R. 67). The term "sponsored employee" distinguishes the person from a "Government employee" (*ibid.*). It refers to "people going to work in the Naval Gun Factory, . . . [as] in the restaurants or cafeterias, or the officers' mess, or the Navy Exchange Store . . . that employ civilians, but are not Government employees . . ." (*ibid.*). To identify Rachel Brawner as a sponsored employee, as the Gun Factory does, makes sense. But to refer to her as a "visitor", despite her everyday employment within the grounds for six and one-half years, is as senseless as it would be to refer to a similarly situated governmental employee as a "visitor."

(c) Section 1411 of the "Visitor Control" procedure, entitled "Escorting Visitors," discloses on its face that the procedure for visitor control has no application to

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[26] Webster's New International Dictionary, Second Edition, Unabridged, defines visitor as "One who makes a visit; one who comes or goes to see a person or place, as for friendship, charity, sightseeing, etc."

a person regularly employed within the Gun Factory. It states that:

> All visitors, except members of the United States Armed Services who have been properly cleared, shall be escorted. "Escorts" are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized. When available, escorts shall be members of the naval service. If a member of the naval service is not available, a competent employee of the Naval Establishment may be designated.

If Rachel Brawner were truly a "visitor," she could not be present within the Gun Factory except if "escorted." Rachel Brawner has never been escorted. As she states in her uncontroverted affidavit (R. 122-123):

> 1. At no time during the full period of my employment at the Bellevue Annex Cafeteria of the Naval Gun Factory, when I came to work each morning, was I ever escorted by anyone from the gate of the Bellevue Annex to Building 65 (the place within the Annex where the cafeteria is located and where I worked). I was never escorted from Building 65 to the gate when I left work each afternoon. I had no escort at any time during any part of the day that I was within the Bellevue Annex.
>
> 2. At the time I first started working at the Annex, before the guards came to know me, upon approaching the gate in the morning to go to work, I placed my identification badge, which was suspended on a chain, about my neck. I walked through the gate without ever being stopped and proceeded directly to my place of work. The guard could observe the badge on me. He never inspected

it. After I became known to the guards, I didn't put the identification badge on, because the guards knew me and let me through just on seeing me.

The same thing happened when I left work in the afternoon. At first, I put the badge on me, but after the guards came to know me, that wasn't necessary.

At no time while I was working in the cafeteria did I wear the identification badge.[27]

(d) A reading of the "Visitor Control" procedure as a whole shows that it has no application to persons like Rachel Brawner regularly employed within the Gun Factory. It is not geared to them. It has no rational relation to them. Indeed, Section 1402 states that "A visitor to a naval shore establishment is any person who is *not* attached to or employed by the command or staff using that station as headquarters." (Emphasis supplied.) While a person like Rachel Brawner is not employed by the command or staff, he would seem to be "attached to" it.

(e) Respondents invoke Section 1403 which, in categorizing visitors, enumerates "Personnel of private facilities under contract to the Department of Defense." The definition is not applicable. It pertains to contractor personnel who normally work on the premises of their employer located *away* from the naval establishment and who have occasion to come to the naval establishment in the course of the performance of the contract or for other reasons. This is

[27] Section 1407 of the 1958 manual, which supersedes the 1954 manual (*supra*, p. 46, n. 25), makes it discretionary rather than obligatory for the commanding officer to have visitors escorted. This change does not detract from the common sense of the type of person comprehended by the word visitor.

confirmed by Section 1415(2) of the 1958 manual, which supersedes the 1954 manual (*supra*, p. 46, n. 25). Entitled "Visits of Contractor Personnel," this section states that: "Department of Defense contractors desiring to have an employee visit an activity of the Naval Establishment involving access to classified information have been instructed to address a request in writing directly to the commanding officer of the activity to be visited."

(f) Independently of Chapter 14, which alone discloses the inapplicability of the visitor control procedure to Rachel Brawner, Chapter 15 of the manual, entitled "Personnel Security Investigations and Clearance For Access To Classified Matter," negatives any departmental authority to deprive a private employee of his job on security grounds without a hearing of any kind.

Section 1501(1) of the manual states that:

> The Chief of Naval Operations (Director of Naval Intelligence), when requested by competent authority, shall be responsible for conducting security investigations of the following:
>
> a. Military and civilian personnel of the Naval Establishment.
>
> b. Private contractors and *contractors' employees* requiring access to classified matter. (*Refer to Armed Forces Industrial Security Regulation*, OPNAV Instruction 5540.8.) (Emphasis supplied.)

Section 1509, entitled "Investigation Requirements for *Contractor Personnel*," similarly states, "*Refer to Armed Forces Industrial Security Regulation*, (OPNAV Instruction 5540.8)." (Emphasis supplied.)

Rachel Brawner is within the class properly identified as "contractors' employees" or "Contractor Personnel." For "security investigations" of such employees, Sections 1501(l) and 1509 of the manual direct reference to the Armed Forces Industrial Security Regulation. This regulation may be found at 20 Fed. Reg. 6773.[28] Section 72.2-202(a) of the regulation provides that:

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[28] Published on September 15, 1955, codification of this regulation was discontinued on April 30, 1956. 21 Fed. Reg. 2814. It was superseded apparently in February 1957 by another regulation of identical title and substantially the same purport. The new regulation is reported in 2 Gov't. Sec. & Loy. Rep. 25:4 (Feb. 1957). We have been unable to find it in the Federal Register. Section 2-202 of the new regulation corresponds to the section quoted in the text. The underscored part of the quoted section appears in identical form in the new section except for the addition of the word "military" before the words "clearing authority." The applicability of the Industrial Personnel Security Review Regulation is further confirmed by sections 2-203(f)(1) and 2-209 of the new regulation, as it was by corresponding sections 72.2-203(f)(1) and 72.2-209 of the old regulation.

However, another revision of this regulation, also not published in the Federal Register, was made apparently in April 1960. The sections cited in the preceding paragraph are unchanged, but a new section 2-209.1 has been added entitled "Denial of Admittance to Military Installations" which reads as follows (2 Gov't. Sec. & Loy. Rep. 25:37 (April 1960)):

> The provisions of paragraph 2-111 [pertaining to denial and revocation of facility security clearances] and 2-209 [pertaining to denial and revocation of personnel security clearances] shall not be interpreted as modifying in any way the authority of the commander of a military activity to deny admittance of any individual to a military installation under his control. Actions taken under this paragraph are not appealable.

We are informed that the new section 2-209.1 was first promulgated on November 20, 1957. The action in this case had been begun on September 6, 1957 (R. 2).

Responsibility for effecting contractor personnel security clearances. (a) Those personnel security clearance actions required in connection with the granting of a facility security clearance (see § 72.2-107) shall be accomplished by the Military Department assigned security cognizance of the facility. Those additional personnel security clearance actions required in connection with a contract will be accomplished by the contracting Military Department, except those which are indicated herein to be accomplished by management. When the cognizant Military Department is different from the contracting Military Department, the cognizant Military Department shall forward the completed forms required for clearance to the security office of the contracting Military Department for processing. *The clearing authority shall complete all actions necessary for the granting of a personnel security clearance and will determine whether to grant the clearance or refer the case to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation.* Subject to the provisions of 72.2-209, any prior industrial security personnel clearance actions that may have been accomplished by any Military Department, provided these actions meet the standards prescribed in this part, shall not be duplicated, but shall be accepted by the Military Department effecting the personnel security clearance. [Emphasis supplied.]

Thus this regulation unambiguously requires that personnel security clearance of contractor's employees, if it is not to be granted, shall be referred "to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation."

We have come full circle. The manual directs reference to the Armed Forces Industrial Security Review

Regulation. The latter directs reference to the Industrial Personnel Security Review Regulation. This regulation is exactly the one that we have heretofore considered at length (*supra*, pp. 31-39). And it directs that private employees who do not have access to classified information are to be let alone.

2. United States Navy Physical Security Manual

Respondents adduce another manual, this one entitled United States Navy Physical Security Manual, promulgated April 14, 1956. The apparent purpose of adducing this manual is to show that by its terms Rachel Brawner had the status of a "visitor" whom the Superintendent of the Gun Factory could exclude from the grounds at will. We now show that, upon any analysis of the definition of "visitor" in this manual, Rachel Brawner is not within the "visitor" class.

Section 0540 of this manual defines "visitor" as follows (p. 5-4):

> For the purpose of this manual, the term "visitor", in addition to its normal connotation, is defined as including employees and others who require infrequent access to security areas or one to whom permanent employee-type identification for such areas has not been issued.

The cafeteria in which Rachel Brawner worked is located in Building 65 of the Bellevue Annex of the Gun Factory (R. 39, 122). The applicability of the "visitor" definition to Rachel Brawner is based on the assumption that the whole of the Bellevue Annex of the Gun Factory constitutes a "security area." This assumption is negated by the manual and the record. The whole of the Annex is known either as a "Naval Activity" or a "Facility" (Secs. 0100(1) and (2), p.

1-3). Particular parts of the activity, based on their "vulnerability to the several elements comprising the security threat," are designated "critical areas" (Sec. 0320, p. 3-3). Certain "critical areas" are then designated as "restricted areas"; "A restricted area may be described as any critical area or place that requires control of access" (Sec. 0321, p. 3-4). In their turn "Restricted areas may be divided into three basic classifications, namely, *security areas*, off-limits areas and safety areas" (*ibid.*, emphasis supplied). In their answers to interrogatories, respondents admit that Rachel Brawner had no authorized "access to any of the *restricted areas* on the premises of the Naval Gun Factory" (R. 99, emphasis supplied). Since Brawner had no access to "restricted areas," she of course had no access to "security areas," these being but a classification within the genus "restricted areas." Hence, the definition of "visitor" in this manual, based on "access to security areas," has no application to Brawner.

Secondly, even if the whole of the Bellevue Annex be deemed a "security area," the definition is still inapplicable to Brawner. For a visitor is one who requires "*infrequent* access to security areas *or* one to whom permanent employee-type identification for such areas has *not* been issued" (emphasis supplied). Brawner's everyday employment within the grounds for six and one-half years can hardly be described as "infrequent," and since she did have an identification badge, she is not "one to whom permanent employee-type identification for such areas has *not* been issued."

Respondents in the court below skipped over the definition of "visitor" and quoted instead from parts

(b) and (c) of Section 0542 (pp. 5-5, 5-6), as follows (res. br. below, p. 16):

> b. Employees performing work at regular or irregular intervals and for a short working period within a security area should be handled by the same procedure adopted for the control of visitors.
>
> c. Employees performing continuous service for the activity within a security area should be handled by the same procedure adopted for regular activity personnel.

The threshold objection to the applicability of either (b) or (c) is the baseless assumption, already discussed, that Brawner does have access to a security area. Furthermore, part (b) cannot in any event apply, for it relates to employees working at "intervals"—"regular or irregular"—"for a short working period," a description which beyond peradventure excludes Brawner's everyday employment for six and one-half years. And since it does exclude continuous employment, it excludes application to Brawner of "the same procedure adopted for the control of visitors," and constitutes further confirmation of the inapplicability of the "visitor" classification to Brawner.

As to part (c), except for its reference to work "within a security area," its language is appropriate to describe employees like Brawner, for it refers to "Employees performing continuous service for the activity. . . ." But such employees, part (c) goes on to say, "should be handled by the same procedure adopted for regular activity personnel." The procedure applicable to "regular activity personnel" with access to classified information employed by private contractors

is defined by the former Industrial Personnel Security Review Regulation and by the present Industrial Personnel Access Authorization Review Regulation (*supra*, pp. 31-41). The procedure of either is the antithesis of what respondents did here. Certain it is that respondents have not shown that the "procedure adopted for regular activity personnel" authorizes their action here.

Finally, parts (b) and (c), as part (a), are introduced by the statement "Contractor's employees performing work in a security area should be provided with and be required to wear a distinctive badge". (Sec. 0542, p. 5-5). This simply requires that a badge be provided and worn. It serves the function of identification only. As Section 0570 (p. 5-7) seems to imply, the determination of security clearance is independent of the grant of a badge as a mere identification device.

3. Section 0734 of the United States Navy Regulations

Respondents invoke Section 0734 of the United States Navy Regulations (R. 114). This section provides that:

> In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:
>
> 1. To conduct public business.
>
> 2. To transact specific private business with individuals at the request of the latter.
>
> 3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.

Presumably respondents would draw from this regulation the investiture of blanket authority in the com-

manding officer to control admission of dealers, tradesmen, or their agents. First of all, the words "dealer's agents" or "tradesmen's agents" are hardly apt descriptions of employees like Rachel Brawner. Second, even if they are, whatever blanket authority might otherwise be drawn from this regulation has been cabined by the other regulations to which we have already adverted. Those other regulations, specific as to subject and detailed as to procedure, govern the generality of this regulation.

4. Other Indicia of Lack of Departmental Authority

Consideration of three additional factors further shows lack of departmental authority.

(a) The superintendent of the Gun Factory did not contemporaneously rely, in explanation of the authority for his action against Rachel Brawner, upon the manuals and Navy Regulations which respondents invoke. On the contrary, he explicitly stated, in answer to an inquiry as to the "statute, executive order, departmental regulation, and or other basis" upon which he relied (R. 31), that he acted pursuant to Section 5(b) (iii) of the Food Services Concessionaire Agreement (R. 32-33, 59-60). Surely if the purported sources of authority later tendered after commencement of the suit were in fact in point, the superintendent would have known of them and invoked them. And, as we later show and as respondents did not challenge in the courts below, the Concessionaire Agreement does not constitute a valid source of authority (*infra*, pp. 65-68).

(b) Whenever the Federal Government through any of its organs has in fact intended to control employ-

ment, either public or private, on the basis of security requirements, it has manifested its intention unequivocally, whether by statute, executive order, or regulation. This is true of governmental employment (materials cited in *Cole* v. *Young*, 351 U.S. 536), private employment (materials cited in *Greene* v. *McElroy*, 360 U.S. 474), shipment as a merchant seaman (materials cited in *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9)), and public and private employment within the scope of the security program of the Atomic Energy Commission (10 CFR, Part 4). It has never been content with the anonymities which respondents invoke in this case. It has always published, as it has not here (*infra*, pp. 58-65), the relevant documents in the Federal Register, whether these were an executive order or a regulation. And the content of the documents has never been such that it was necessary to guess that their meaning was directed to controlling employment on the basis of security requirements.

(c) As we have said (*supra*, p. 29), this Court has firmly established the rule that, if employment is to be governed by security requirements, the authority must be explicitly stated, and will not be enlarged upon by implication. The purported sources of departmental authority tendered by respondents do not begin to meet the tight test of authority enjoined by this Court.

D. THE PUBLICATION REQUIREMENT OF SECTION 3(a) OF THE ADMINISTRATIVE PROCEDURE ACT

The administrative materials invoked by respondents to establish departmental authority were not published in the Federal Register. In the absence of publication, reliance upon the materials to show authorization is precluded, even if they otherwise sufficed.

1. Section 3(a) of the Administrative Procedure Act[29] states explicitly that:

> Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Unless within an exemption, there is no question but that the materials invoked by respondents are within the class whose publication is required. Indeed, the failure to publish them exemplifies the mischief at which the publication requirement was directed. A procedure for visitor control is asserted, vitally affecting the interests of the citizenry, but none can know of it or by diligent search uncover it until it is disclosed for the first time in the course of a lawsuit. The questions put by Mr. Justice Brandeis, during oral argument in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, might well be asked here (Mason, *Brandeis, A Free Man's Life*, 618 (1946)):

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[29] 60 Stat. 237, 5 USC § 1001.

The New Deal was introduced to the Court under most inauspicious circumstances, December 10, 1934, when government attorneys argued on behalf of the validity of certain orders of the President issued under NIRA [National Industrial Recovery Act] which purported to authorize him to prohibit the transportation in interstate commerce of "hot oil", i.e., of oil produced in violation of state government laws. Counsel in opposition complained that their client was arrested, indicted, and held in jail several days for violating a law that did not exist. The client said he had seen only one copy of the code and that was in the "hip pocket of a government agent sent down to Texas from Washington." Brandeis was immediately aroused. Here, surely, was proof of what happens when bigness afflicts government.

"Who promulgates these orders and codes that have the force of law?" the Justice asked.

"They are promulgated by the President, and I assume they are on the record at the State Department," the government's attorney replied.

"Is there any official or general publication of these executive orders?"

"Not that I know of."

"Well, is there any way," Brandeis pursued, "by which one can find out what is in these executive orders when they are issued?"

"I think it would be rather difficult, but it is possible to get certified copies of the executive orders and codes from NRA [National Recovery Administration]," government counsel replied somewhat lamely.

The Federal Register system had its origin in the need uncovered during the argument in *Panama Refining Co.* v. *Ryan* for public information of the content of laws

spewed from executive desks.[30] Section 3 of the Administrative Procedure Act brought to fruition the right of the public to know by making it the positive obligation of the agency to publish its organization, procedures, and substantive rules.[31]

2. To excuse failure to publish, respondents contended in the court below that the materials invoked by them were exempt from publication. Of the two exemptions urged by respondents, the court below adopted one and added another *sua sponte*.

(a) Respondents urged that Section 4 of the Administrative procedure Act exempted from the ruling making procedure prescribed by that section "any . . . naval . . . function of the United States. . . ." This is beside the point. Exemption from the rule making procedure is not exemption from the separate obligation to publish independently required by Section 3(a). The court below did not adopt this contention.

(b) Respondents urged that their materials were within the exemption expressed in the introductory clause of Section 3 excluding from the obligation to publish "any matter relating solely to the internal management of an agency. . . ." The short answer is that interference with the employment of a private employee of a private employer does not relate "solely" to the internal management of the agency. This exemption is to apply where "only internal

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[30] 1 Davis, Admin. L. Treatise, 392-393 (1958).

[31] Legislative History, Administrative Procedure Act. S. Doc. No. 248, 79th Cong., 2d Sess., 15-16, 194, 198, 255-256, 356-357; Final Report, Att'y. Gen. Com. Admin. Proc., S. Doc. No. 8, 77th Cong., 1st Sess., 25-29.

agency 'housekeeping' arrangements are involved";[32] the exception is to be strictly construed[33] and is not "operative unless the excepted subject matter is clearly and directly involved."[34] In holding that this exception was nevertheless applicable, the court below stated that the "public effect is remote" (R. 153). If a private employee's loss of his job is a "remote effect," it is hard to imagine what is not. To subject a citizen to the loss of his job, and to brand him as a security risk in the process, cannot be dismissed as a housekeeping detail related "solely" to internal management.

(c) As the legislative history shows (notes 33 and 34, *supra*), the requirement that the exception is to be strictly construed and is not "operative unless the excepted subject matter is clearly and directly involved" is applicable also to the additional exemption of "any function of the United States requiring secrecy in the public interest." Invoking this exception *sua sponte*, the court below holds that, in their application to the Naval Gun Factory, the administrative materials relied upon by respondents are excluded by it from the obligation to publish (R. 152).

The court below is at pains to limit its holding to the Gun Factory. It states that, "Certainly the operation of an agency for the design, planning, and production of naval guns and other ordnance is a function requiring secrecy in the public interest. . . . Therefore, in so far as these regulations apply to the Naval Gun Factory, they need not be published to establish their

[32] Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 194.

[33] *Id.* at 198, 255.

[34] *Id.* at 255.

validity. We are not concerned with their validity in any other application" (R. 152). The attempted bifurcation is fallacious. One and the same regulation must be either published or not published. It cannot be subject to the obligation to publish in one situation but not in another. If it is granted that there are situations in which its publication is required in order to privilege its application and that its application is intended in such situations, there cannot be any claim that its contents should be secret in any situation. Once it is published it is disclosed. In short, the court below cannot, as to one and the same regulation, divide the obligation to publish. The ink cannot be visible in one application of the regulation but invisible in another.

But the objection to the court's holding is more fundamental. The issue is not, as the court below seems to think, whether plans for the production of ordnance should be published. The question is whether the contents of the unpublished materials require "secrecy in the public interest." And the short answer is that none of the administrative materials invoked by respondents contain anything secret. The manuals are not even classified confidential. The method which the manuals describe for safeguarding classified information spell out a standard operating procedure which is general in character and altogether nonsecret in content. The court below makes the mistake of thinking that a description of a method for keeping secrets is itself secret. And the consuming but erroneous concept of the court below is that because a function is military it must be secret.

In explaining the exclusion from the obligation to publish of "any function of the United States requir-

ing secrecy in the public interest," the House Report stated that, "'Public interest' means manifest need in order to achieve the due execution of authorized functions."[35] Publication of the materials relied upon by respondents would not in the least hamper the Gun Factory's "due execution of authorized functions." The limited scope of the exception is also revealed by the definition of "Agency" in Section 2(a) of the Administrative Procedure Act. It states in part that, "*Except as to the requirement of Section 3*, there shall be excluded from the operation of this Act . . . (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory. . . ." (Emphasis supplied.) Thus, "It should be noted," as the Senate Report explained, "that even war functions are not exempted from the public information requirement of section 3."[36] Since "naval authority exercised in the field in time of war" is not exempt from the obligation to publish, it is plain that nothing in the exception of functions "requiring secrecy in the public interest" extends to administrative materials describing standard operating procedure generally applicable throughout the Navy Department. It is therefore not surprising that, although invoked by the court below *sua sponte*, respondents did not themselves urge the applicability of this exception.

3. The concluding sentence of Section 3(a) of the Administrative Procedure Act provides that: "No person shall in any manner be required to resort to or-

[35] Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 255.

[36] *Id.* at 196, and see, at 253.

ganization or procedure not so published." Writing for the Court of Appeals for the Second Circuit, Judge Learned Hand stated that, "We read the language . . . as including not only affirmative resort, but also any subjection to unpublished procedure." *Columbia Research Corp.* v. *Schaffer*, 256 F. 2d 677, 680 (C.A. 2). Invocation of an unpublished procedure subjecting a private employee to loss of his job and besmirchment of his name is thus invalid. If a private employee is indeed to be placed in that position of peril, the public information requirement of Section 3(a) means that he shall at least have advance notice of his vulnerability.

E. NO AUTHORITY CONFERRED BY THE FOOD SERVICES CONCESSIONAIRE AGREEMENT

In causing Rachel Brawner to lose her job, the superintendent of the Gun Factory invoked that provision of the Food Services Concessionaire Agreement by which the employer had contracted not to "engage, or continue to engage, for operations under this Agreement, personnel who . . . fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (R. 6, 32-33, 59-60, 62-63, 68-69). Although this was the contemporaneous basis for the action taken, in the courts below respondents abandoned reliance upon the Concessionaire Agreement as a source of authority. As we now show, the agreement could not authorize or validate respondents' conduct.

Authority which does not exist in the absence of the Concessionaire Agreement cannot be conferred by the agreement. Lack of authority is not overcome because respondents have contracted in advance to re-

quire another to do an act which they have no right to demand. The private employer can be no source of authority for action taken by respondents. All that the agreement with the private employer manifests is the employer's acquiescence in respondents' demand. But authority to execute or require performance of the agreement must be derived from a source other than the agreement; and as such authority does not independently exist, action pursuant to the agreement is no more valid than action pursuant to an executive order in conflict with a statute, or a statute in conflict with the Constitution. Positing just such a case as this, A. A. Berle, Jr., wrote (Berle, *The 20th Century Capitalist Revolution*, 96, 99 (1954)):

> Without such authority, the Federal Government has no more right to demand that the General Electric discharge the three men than you or I might have. Nor can it enlarge its powers by any form of contract it may exact from General Electric or any other corporation. All it can do by that is to get General Electric into trouble.
>
> * * *
>
> This would seem to be the position of a corporation which discharges men in conformity with a clause in a government contract—if it be found that the direction given to it by the government agency was given without valid authority, or that the procedure in applying it violated due process of law.

All that the agreement does is to reduce to writing the arrogation of authority never conferred.[37]

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[37] Furthermore, the lack of authority to enter into Section 5(b)(iii) of the Concessionaire Agreement is further demonstrated by the Department of Defense regulation reported in 32 CFR,

Furthermore, Section 5(b) of the Concessionaire Agreement, insofar as it purports to affect the wages, hours, and working conditions of the employees whom the Union represents, is in any event invalid because in conflict with the National Labor Relations Act.[38] The National Labor Relations Board certified, and the collective bargaining agreement recognizes, the Union as the exclusive bargaining representative of the employees working in the cafeterias operated at the Gun Factory (*supra*, p. 3). Section 9(a) of the National Labor Relations Act provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representative* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . . [Emphasis supplied.]

"The National Labor Relations Act makes it the duty of the employer to bargain collectively with chosen representative of his employees. The obligation being exclusive, . . . *it exacts 'the negative duty to treat with no other.'*" *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-684 (emphasis sup-

1960 Cum. Supp., 7.104-12. That regulation sets forth the form of "Military Security Requirements" clause which is to be inserted "in all contracts which are classified by a Department as 'Confidential,' including 'Confidential—Modified Handling Authorized,' or higher and in any other contracts the performance of which will require access to such classified information or material. . . ." There is no resemblance between the required clause and Section 5(b)(iii) of the Food Services Concessionaire Agreement.

[38] 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1952).

plied).[39] And, of course, "collective bargaining extends to matters involving discharge actions. . . ." *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247, 252 (C.A. 7) cert. denied, 336 U.S. 960.

In this case by contracting with the Board of Governors of the Naval Gun Factory to discharge employees who allegedly fail to meet the standards prescribed by Section 5(b) of the Food Services Concessionaire Agreement, the employer violated its statutory duty "to treat with no other" than the Union "in respect to rates of pay, wages, hours of employment, or other conditions of employment." A contract which is the product of an employer's violation of his statutory duty is invalid.[40] Without the Union's concurrence in it,[41] no contract between the employer and a third party which affects wages, hours, or working conditions can bind the Union or the employees it represents. Section 5(b) of the Food Services Concessionaire Agreement, insofar as it is sought to be applied in this case, falls as a result of its incompatibility with the National Labor Relations Act.

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[39] See also, *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342; *May Dep't. Stores* v. *National Labor Relations Board*, 326 U.S. 376, 384; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 336-340; *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, 200; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 238; *Conley* v. *Gibson*, 355 U.S. 41, 46.

[40] *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 337; *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 364; *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 106.

[41] Not only has the Union never concurred in Section 5(b) of the Company's agreement with the Board of Governors, it did not even know of the existence of this agreement until it was uncovered in this case (R. 14, 48-49).

F. LACK OF EXECUTIVE OR CONGRESSIONAL SANCTION

We have shown that there is no departmental authority for the action taken by respondents. But even if departmental authority existed, it would not suffice as a valid source of authority in the absence of underlying executive or congressional sanction to support the administrative assumption of power. That is the teaching of *Greene* v. *McElroy*, 360 U.S. 474. This Court invalidated a regulation for want of "*explicit authorization* from either the President or Congress" empowering administrative deprivation of a private employee's job on security grounds "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508, emphasis supplied). *A fortiori*, in this case, neither the President nor Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all.

1. No executive authorization is claimed or exists. On the contrary, since *Greene* v. *McElroy*, on February 20, 1960, by Executive Order No. 10865, in determining whether authorization for access to classified information should be denied or revoked, the President has required the Secretary of Defense and other enumerated department heads to afford the applicant a hearing, including with certain limitations "an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue. . . ." 25 Fed. Reg. 1583, Sec. 4(a), *supra*, p. 39. As the President has enjoined a hearing, including a limited opportunity for cross-examination, on behalf of employees with access to classified information, it is hardly likely that he has authorized the

taking of wholly summary action against employees with no access to classified information.[42]

2. Nor has Congress authorized the exercise of summary power. On the contrary, the statutes urged in this case to establish authority to act without any hearing at all are less substantial than the statutes which in *Greene* v. *McElroy* were held not to establish authority to act on the basis of a limited hearing. "Explicit authorization" to act altogether summarily is surely lacking.

(a) Respondents invoke 62 Stat. 765, 18 USC § 1382. It provides *inter alia* that "Whoever reenters or is found" within any naval installation "after having been removed therefrom or ordered not to reenter by any officer or person in command thereof" shall be punishable by a $500 fine or six months imprisonment or both.[43] The duty not to reenter the installation after being ordered from it is hardly determinative of the

[42] If he had, a grave question would be presented, independently of the First and Fifth Amendments (*infra*, pp. 77-86), whether such authorization would be consistent with the limitations upon the exercise of executive power. The "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Greene* v. *McElroy*, 360 U.S. 474, 492. See also, *Railway Employees' Dept.* v. *Hanson*, 341 U.S. 225, 234. If that right "is to be regulated, it must be pursuant to the law-making functions of Congress." *Kent* v. *Dulles*, 357 U.S. 116, 129. See also, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

[43] The first part of this statute clearly has no applicability. It pertains to "whoever . . . goes upon any . . . naval . . . installation for any purpose prohibited by law or lawful regulation." There is no question here of entry for a prohibited purpose. The difference between the two parts is construed in *Holdridge* v. *United States*, 282 F. 2d 302, 308-309 (C.A. 8).

question whether the original ouster was authorized. It is no more so than is the duty to obey a judicial decree during the pendency of a proceeding to ascertain its validity determinative of the court's jurisdiction to enter the decree in the first instance. *United States* v. *United Mine Workers*, 330 U.S. 258, 289-295, 307-312. The statute does not imply more than it says, namely, reentry after removal is criminal. Does the statute thereby authorize the officer to use unnecessary force in effecting the removal? The statute surely does not constitute "explicit authorization" to cause an employee to lose his job on security grounds without any hearing or process of any kind.

(b) Respondents invoke 64 Stat. 1005, 50 USC §797. This statute provides in part that:

> (a) Whoever willfully shall violate any such regulation or order as, pursuant to lawful authority, shall be or has been promulgated or approved by the Secretary of Defense, or by any military commander designated by the Secretary of Defense, . . . for the protection or security of . . . property or places subject to the jurisdiction, administration, or in the custody of the Department of Defense, . . . relating to . . . the ingress thereto or egress or removal of persons therefrom, . . . shall be guilty of a misdemeanor. . . .
>
> (b) Every such regulation or order shall be posted in conspicuous and appropriate places.

This statute is plainly inapplicable. It pertains to the willful violation of any regulation or order issued "pursuant to lawful authority." The very question in this case is whether "lawful authority" exists for the action taken. Furthermore, part (b) of the statute provides that "Every such regulation or order shall be

posted in conspicuous and appropriate places." There is no showing that any of the administrative materials upon which respondents rely were posted in conspicuous and appropriate places, and by their very character they would not and could not be. None of them, therefore, derive from any authority conferred by this statute. Indeed, Department of Defense Directive 5200.8 (R. 119-122), which administratively implements this statute, provides in part that: "Regulations issued pursuant hereto shall be posted in a conspicuous and appropriate place, and shall make appropriate citation of this designation and the Public Law under which the designation is made" (R. 122). None of the administrative materials adduced by respondents were issued "pursuant hereto."

(c) Respondents invoke 5 USC § 22, providing that:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. This section does not authorize withholding information from the public or limiting the availability of records to the public.

To this is added 10 USC § 5031, providing that the "Secretary of the Navy has custody and charge of all books, records, and other property of the Department," and 10 USC § 6011, providing that "United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President."

One may say of these statutes, as this Court said in *Greene* v. *McElroy*, 360 U.S. 474, 503, of the National Security Act of 1947, as amended, 5 USC §§ 171

et seq., "That Act created the Department of Defense and gave to the Secretary of Defense and the Secretaries of the armed services the authority to administer their departments. Nowhere in the Act, or its amendments, is there found specific authority to create a clearance program similar to the one now in effect."

Specifically as to 5 USC § 22, authorizing a department head to prescribe regulations for the government of his department, the court below in *Greene* v. *McElroy* disclaimed reliance upon it as a source of authority (254 F. 2d 944, 949), and this Court did not mention it. It is indeed but a housekeeping statute. Its limited scope is revealed by the sentence added to it on August 12, 1958: "This section does not authorize withholding information from the public or limiting the availability of records to the public." P.L. 85-619, 72 Stat. 547. The House Report in explaining this addition illuminates the modest role which Congress attributes to this statute (H. Rep. No. 1461, 85th Cong., 2d Sess., 1, 2, 7):[44]

> This bill would return section 22 of title 5 of the United States Code to what appears to have been the original purpose for which it was enacted in 1789. * * *
>
> The law has been called an office "housekeeping" statute, enacted to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents. * * *
>
> When Congress has determined that a specific area of information must be closed to the public, legislation has been enacted accomplishing this purpose. The laws are legion which limit the

[44] See also, S. Rep. No. 1621, 85th Cong., 2d Sess.

public's right to know—income tax laws, for example, and those covering crop reports, trade secrets, inventions, and military matters.

Where Congress has not acted, the executive officials have gradually moved in over the years. The "housekeeping" statute (5 USC 22) has become a convenient blanket to hide anything which Congress may have neglected or refused to include under specific secrecy laws.

* * *

Impartial witnesses gave the subcommittee clear-cut statements that title 5, United States Code, section 22, was never intended, either by Congress or the courts, to be anything other than a "housekeeping" statute.

A housekeeping statute does not constitute "explicit authorization" to cause the summary loss of a private employee's job on security grounds without any hearing or process of any kind.

3. To say that the administrative assumption of power asserted in this case has been delegated by the President or Congress is to say that they have authorized federal officers to do as they please. "No standards are specified .... No criteria are available...."[45] Respondents are bound by nothing but their uncontrolled will. To place such unchannelled and ungoverned power in the hands of an official is itself an invalid delegation of authority. For a matter cannot be left to a subordinate "without standard or rule, to be dealt with as he pleased."[46] Delegation of such

[45] *Pederson* v. *Benson*, 255 F. 2d 524, 527 (C.A.D.C.).

[46] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 418.

power is fatally defective for standards must exist "adequate to pass scrutiny by the accepted tests."[47]

4. The court below enumerates the power which the Constitution invests in the Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, § 3, cl. 2); to "exercise exclusive legislation in all cases whatsoever, over such district . . . as may . . . become the seat of the government of the United States" (Art. I, § 8 cl. 17); to "provide and maintain a navy" (Art. I, § 8, cl. 13); and to "make rules for the government and regulation of the land and naval forces" (Art. I, § 8, cl. 14) (R. 148). These and other provisions are sources from which Congress might derive constitutional power to legislate upon the subject. They do not by their own force in the absence of implementing legislation authorize any conduct. The point in this case is that Congress has not authorized respondents to act as they did, and it is bootless to suggest that Congress perchance has the power to do so if it would but exercise it.

And it bears remembering that the constitutional provisions enumerated by the court below must be matched against the words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ," and the words of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ." As we presently show, had Congress in fact authorized the exercise of the powers asserted by respondents, it could not survive the prohibitions of

[47] *Kent* v. *Dulles*, 357 U.S. 116, 129.

the Fifth and First Amendments (*infra*, pp. 77-86). At the least the doubts are grave. This is relevant to the question whether the authorization asserted has been granted. For it is elementary that that construction is to be adopted which avoids constitutional doubts.[48]

5. Perhaps as good a demonstration of respondents' lack of authority is their answer to the interrogatory directed to this question. Respondents were asked to "state in detail the authority by which you support the action taken by you" (R. 98). Their answer to this interrogatory is that (R. 100):

> This interrogatory calls for a conclusion of law which defendants are not required to answer, however the defendants refer the plaintiffs to the following.
>
> The United States Constitution.
>
> The United States Code and United States Statutes at large.
>
> United States Navy Regulations, 1948, as amended.
>
> United States Navy Security Manual for Classified Information.

This contemptuous and arrogant response is characteristic of respondents' highhanded action. It bespeaks manifest disregard for authority rather than scrupulous concern to stay within its bounds.

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[48] *United States* v. *Rumley*, 345 U.S. 41, 45-46; *Peters* v. *Hobby*, 349 U.S. 331, 338; *United States ex rel. Attorney General* v. *Delaware and Hudson Co.*, 213 U.S. 366, 408.

III. RESPONDENTS' ACTION IS UNCONSTITUTIONAL IF AUTHORIZED

In the name of security respondents assert the power to cause Rachel Brawner to lose her job, to impair her employment opportunities, and to besmirch her reputation. In the name of security they assert the power to find that Rachel Brawner fails to meet "security requirements," without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. This total subjugation of the security of the citizen in the name of the security of the state shocks a civilized conscience. It offends the guarantees of the Fifth and First Amendments.

A. FIFTH AMENDMENT

The Fifth Amendment requires fair play. Obeisance to the say-so of a security officer, with no opportunity to defend or be heard, is at war with fair play. This much seemed to be conceded by the Solicitor General in oral argument in *Greene* v. *McElroy*. In a colloquy with Mr. Justice Harlan, he agreed that at least some hearing was indispensable to satisfy the prerequisites of due process (27 U.S. Law Week 3275, 3277-78, April 7, 1959):

> Mr. Justice Harlan: "Is it your position that the government would have the right to discharge employees without a hearing?"
>
> [Solicitor General:] "The Wieman case, 344 U.S. 183, presents a problem there. Under that case, the standard cannot be irrational. But here the basic question is whether the man has a right to government secrets as a matter of due process.

> The ultimate question is, if the government has a hearing and has information of a confidential character from an undercover agent and that person has seen the employee actively participating in a Communist cell, is this Court going to tell the government that it must disregard such information."
>
> * * *
>
> Mr. Justice Harlan: "What you are saying in effect is that due process is satisfied if the agency gives the employee an opportunity to be heard in his defense. Could the government discharge him without a hearing?"
>
> "It might be so irrational that it couldn't be done."
>
> "Then due process requires some kind of a hearing?"
>
> "Yes. A process of balancing is involved."
>
> "Then the government can't deny the right to a hearing of some kind?"
>
> "I don't think so."

There is little to add to what Mr. Justice Frankfurter wrote in concurrence in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 160-174, in condemning the Attorney-General's designation of an organization as subversive without notice or hearing. He stated in part (*id.* at 161-162, 165-166, 170, 171-172):

> . . . [D]esignation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent. It is claimed that thus to

maim or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment.

Fairness of procedure is "due process in the primary sense." *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 681. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, . . ." *Japanese Immigrant Case (Yamataya* v. *Fisher)*, 189 U.S. 86, 100, 101. "[B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar* v. *Reclamation Dist.*, 111 U.S. 701, 708. "Before property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts." *Southern R. Co.* v. *Virginia*, 290 U.S. 190, 199. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement

of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill, supra*, 281 U.S. at 682.

* * *

The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. [Cases cited.] Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.

* * *

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

* * *

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely

depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

As Mr. Justice Douglas observed in concurrence in *Joint Anti-Fascist Refugee Committee*, the evil of acting without notice and hearing, mischievous enough when it is an organization which is jeopardized, is compounded when it is the fate of the individual which is at stake (*id.* at 178). As he also stated (*ibid.*):

Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. [Cases cited.] The gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as "subversive." No more critical governmental ruling can be made against an organization these days. It condemns without trial. It destroys without opportunity to be heard. The condemnation may in each case be wholly justified. But government in this country cannot by edict condemn or place beyond the pale. The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and to rebut the charge.

The Court of Appeals for the Ninth Circuit too wrote in a great tradition in *Parker* v. *Lester*, 227 F.

2d 708 (C.A. 9). Under an executive order[49] issued pursuant to the Magnuson Act,[50] seamen were required to have security clearance to serve on merchant vessels, which the Commandant of the Coast Guard granted if he was "satisfied that . . . the presence of the individual on board would not be inimical to the security of the United States." Seamen had been denied clearance after hearings which did not include presentation of evidence against them. The Court of Appeals asked: "Is this system of secret informers, whisperers and tale bearers of such vital importance that it must be preserved at the cost of denying to the citizen even a modicum of the protection associated with due process?" 227 F. 2d at 719. It answered: "the system of screening here under attack constitutes a violation of due process" (*id.* at 720), expressing its faith that "the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists" (*id.* at 721). Yet what was condemned in *Parker* v. *Lester* is pale by comparison with what was done in this case.

But for the bewitchment of security and the spell of the military, there would hardly be room for doubt. The Arizona Supreme Court recently wrote with compelling clarity in a context not different in principle from this case but free of diverting influence. *In re Burke*, 87 Ariz. 336, 351 P. 2d 169. A member of the Minnesota bar sought admission to the Arizona bar. Based on the evidence presented by him, the applicant was of good moral character, but the Committee on Examinations and Admissions declined to recommend

[49] Exec. order No. 10173, 15 Fed. Reg. 7005, 7007.

[50] 64 Stat. 427, 50 USC §§ 191, 192, 194.

his admission, relying upon derogatory information contained in a confidential report, secret and undisclosed, received from "the National Conference of Bar Examiners, an efficient organization which conducts investigations of the character and background of applicants for bar admission in almost every state" (351 P. 2d at 172). The Arizona Supreme Court ordered the applicant's admission to the bar, holding that a secret report could not be a valid basis for rejection. It explained that (*ibid.*):

> We shall not compel the committee to abuse its trust and reveal its sources. This would not only sanction a breach of trust but would dry up its sources and destroy its future effectiveness. However, we cannot allow information of this nature to be used by the committee for the purpose of denying a man due process in so vital a matter as the right to practice his chosen profession. To do so would be to open the door to the most noxious type of character assassination and guilt by innuendo. If respectable persons have derogatory information or bona fide charges to level against an applicant, they should not hesitate to come out into the open and speak the truth. If they insist on hiding behind a cloak of secrecy, then their evidence cannot be used to impeach the character of a man whose only apparent fault has been to acquire a few devious secret enemies.
>
> We hold therefore that denial of admission to the practice of law cannot be based solely upon secret reports not revealed to the applicant.

The axe fell on Rachel Brawner without notice, without explication of what the security requirements constitute, without a statement of reasons particularizing the respects in which she allegedly failed to meet them, without an opportunity to answer, without presenta-

tion of the evidence against her, and without presentation of evidence on her behalf. The only alternative to saying that Rachel Brawner was denied due process is to say that she is entitled to none.

B. FIRST AMENDMENT

Not only is the total subjection of the individual to the uncontrolled will of the officers offensive to due process (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 366-367), it conflicts with the First Amendment as well. Under the regime of absolute governmental power manifest by this case the only safety of the citizen against official oppression—if he is safe even then—is to speak only banalities, to read or write only commonplaces, and to associate with none about whom an eyebrow could be raised. Anything less than unrelieved anonymity exposes the individual to the risk of governmental condemnation as a security risk without even the right to know the why or the where, much less to defend. In this environment every value that the First Amendment is designed to protect against governmental abridgment would perish.

The Navy Department itself cautions employees to conform and to abjure unconventional belief and expression. Its "Suggested Counsel to Employees," appended to its "Navy Civilian Personnel Instructions," states that:[51]

> A number of our citizens unwittingly expose themselves to unfavorable or suspicious appraisal which they can and should avoid. This may take the form of an indiscreet remark; an unwise selection of friends or associates; membership in an organization whose true objectives are concealed

[51] Quoted in Brown, *Loyalty and Security*, 191, n. 8 (1958).

behind a popular and innocuous title; attendance at and participation in the meetings and functions of such organizations even though not an official member; or numerous other clever means designed to attract support under false colors or serving to impress an individual with his own importance.

It is advisable to study and seek wise and mature counsel prior to association with persons or organizations of any political or civic nature, no matter what their apparent motives may be, in order to determine the true motives and purposes of the organization. . . .

The existence of [rights and liberties under the Constitution] should encourage and inspire each one of us to so conduct ourselves that there cannot be the least concern on the part of our associates as to our adherence to the principles of this government, or as to our reliability. . . . This counsel is prompted by the Commanding Officer's sincere interest in the continued well-being of all employees of the activity.

A Navy hearing board stated that an employee "must order his life with such positive knowledge as will absolutely negate the risk of guilt by association." [52] These remarks simply make explicit what is terribly evident even when unspoken. And behind the drive to orthodoxy "is a severe sanction: conform or lose your job. Furthermore, the sanction usually has the weight of government behind it. We thus meet head on the deep-rooted repugnance of our people, expressed in the First Amendment, to official control of opinion." [53]

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[52] *Ibid.*

[53] *Id.* at 193.

This case is at the extreme of official oppression. Stripped of any means to defend, the employee can only protect himself by living the life of a cipher. Unafraid expression of belief must be relinquished; apprehensive association is the order of the day. The values enshrined by the First Amendment are eroded. The encroachment may be indirect, but it is not for that reason constitutionally less objectionable.[54] So long as the First Amendment stands, respondents' action cannot.[55]

IV. RESPONDENTS CANNOT ESCAPE ANSWERABILITY FOR THEIR UNAUTHORIZED AND UNCONSTITUTIONAL CONDUCT BY THEIR CLAIM THAT RACHEL BRAWNER WAS NOT SUFFICIENTLY INJURED BY IT, NOR BY THEIR CLAIM THAT THE GOVERNMENTAL OWNERSHIP OF THE LAND ON WHICH THEY ACTED ABSOLUTELY LICENSED WHAT THEY DID

We return to *Greene* v. *McElroy*, 360 U.S. 474. This case differs from *Greene* only in that the action taken here is more extreme. William Greene was given a limited hearing; Rachel Brawner had no hearing at all. William Greene had access to classified information; Rachel Brawner did not. Respondents in *Greene* acted in conformity with a departmental regulation which was defective for want of authority from the President or Congress; respondents in this case lacked even departmental authority. And the unconstitutional character of the action taken, if authorized, is more obvious in this case than in *Greene*.

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[54] *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 461; *Speiser* v. *Randall*, 357 U.S. 513, 518-519.

[55] In addition to the cases cited in the preceding note, see *Watkins* v. *United States*, 354 U.S. 178; *Sweezy* v. *New Hampshire*, 354 U.S. 234.

Nevertheless the court below holds that *Greene* v. *McElroy* does not control. It asserts (1) that Rachel Brawner was insufficiently injured to complain, and (2) that respondents' conduct was absolutely licensed by the governmental ownership of the land on which they acted. We turn to these propositions.

A. INJURY

The court below states that *Greene* v. *McElroy* is different from this case because, as William Greene is an aeronautical engineer and Rachel Brawner is a cook, denial of security clearance to Greene meant "total debarment from an occupation" (R. 157, 158, 163, 164), whereas Brawner could continue to work at "scores of places open to short-order cooks here and everywhere" (R. 159). The distinction is irrelevant in law and inaccurate in fact.

1. Mike Raich worked as a cook in a restaurant in Arizona. Of his employment as a cook, this Court stated: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41. This Court affirmed an injunction restraining Raich's employer from complying with, and state officials from enforcing, a state statute which unconstitutionally required the employer to discharge him. Rejecting the argument that Mike Raich had no legally protected interest in his job as a cook because it was "an employment at will," this Court explained that (239 U.S. at 38):

> The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the

weight of authority, the unjustified interference of third persons is actionable although the employment is at will.

Rachel Brawner stands in an *a fortiori* position. For her employment was not at will. The collective bargaining agreement safeguarded her against discharge or suspension "without good and sufficient cause" (*supra*, p. 4).[56] She surely has a legally protected

[56] *Woodward Iron Co.* v. *Ware*, 261 F. 2d 138, 140 (C.A. 5). For a description of the scope of the substantive and procedural protection which an employee enjoys under such an agreement, see Phelps, *Discipline and Discharge in the Unionized Firm* (1959); Stessin, *Employee Discipline* (1960). Where "an employee is disciplined for having allegedly committed some act of moral turpitude, such as stealing, engaging in aberrant sexual practices, or participating in subversive activities . . . the arbitrator will generally insist in such cases that the employer prove his charges beyond a reasonable doubt." Aaron, *Some Procedural Problems In Arbitration*, 10 Vand. L. Rev. 733, 742 (1957). *E.g.*, *United States Steel Corp.*, 29 LA 272, 277; *Cannon Electric Co.*, 28 LA 879, 883; *Kroger Co.*, 25 LA 906, 908; *Marlin Rockwell Corp.*, 24 LA 728, 729-730; *General Refractories Co.*, 24 LA 471, 481-482; *Fruehauf Trailer Co.*, 21 LA 832, 834-836; *Amelia Earhart Luggage Co.*, 11 LA 301, 302. The reason for proof beyond a reasonable doubt is that to sustain a discharge for criminal or other opprobrious conduct stigmatizes the employee and impairs his employment opportunities elsewhere. For this reason too it has been stated that there is in this class of cases a "clear exception to the general rule of informality in the introduction of evidence and the examination of witnesses. * * * [T]he employee should be permitted to invoke some of the legal rules of evidence for his own protection. In most instances of this kind the principle problem concerns the rights of confrontation and cross-examination." Aaron, *op. cit.*, 10 Vand. L. Rev. at 745-746. In the case of discharges oriented in loyalty and security considerations, there is increasing insistence upon solid substantiation of the genuine need for dismissal. *E.g.*, *Westinghouse Electric Corp.*, 35 LA 315; *RCA Communications, Inc.*, 29 LA 567; *Republic Steel Corp.*, 28 LA 810; *Pratt & Whitney Co., Inc.*, 28 LA 669; *National Food Corp.*, 24 LA 567; *Worthington Corp.*, 24 LA 1; *J. H. Day Co., Inc.*, 22 LA 751, 755.

interest against the "unjustified interference" with the retention of her employment. The same law that protected Mike Raich's job as a cook protects Rachel Brawner's.

2. Even if it were true that the sole injury suffered by Rachel Brawner was the loss of her particular job in the Gun Factory cafeteria which she had held for six and one-half years, it would be injury enough. *Peters* v. *Hobby*, 349 U.S. 331, teaches as much. Dr. Peters was a professor of medicine at Yale University. He was employed as a Special Consultant in the United States Public Health Service. His services in that capacity comprised four to ten days each year, for which he was compensated at a specified *per diem* rate for days actually worked. 349 U.S. at 333-334. Yet that was held to be a sufficient interest to entitle Dr. Peters to protest his debarment from federal employment. And this was so despite the absence of the slightest suggestion that his work in his chosen field was impaired, for there is no intimation that Dr. Peters' full-time employment at Yale University as professor of medicine was jeopardized in the least. If a medical consultant's four to ten days employment in that capacity in an annual period is sufficient, surely a cook's full-time employment is entitled to the protection of the law.

The penultimate sentence of this Court's opinion in *Greene* v. *McElroy* identified the injury to William Greene as the loss of "his job" (360 U.S. at 508). This Court further stated in *Greene* v. *McElroy* that the "right to hold *specific private employment* and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . ."

(360 U.S. at 492, emphasis supplied). The advertence to "specific private employment" separately from pursuit of a "chosen profession" is meaningful only as it identifies the loss of a particular job as itself a sufficient injury. Finally, in *Taylor* v. *McElroy*, 360 U.S. 709, a companion case to *Greene* v. *McElroy* dismissed as moot, the employee denied clearance and consequently discharged was a lathe operator and tool and die maker. Mootness aside, it is inconceivable that the result in *Taylor* v. *McElroy* would have been different from *Greene* v. *McElroy* because there are "scores of places open to" a lathe operator and tool and die maker "here and everywhere." The difference between a menial job and a distinguished job, between work with the hand and work with the brain or both together, is a distinction to which the law is blind.

3. Rachel Brawner's loss of her job at the Gun Factory has caused her a permanent injury from which she can never recover regardless of her securing a comparable job elsewhere. She had six and one-half years' seniority when she was discharged.[37] Under a collective bargaining agreement, among other things, seniority protects the older employees from layoff until the employees junior to him have been furloughed. Without returning to the employment from which she was discharged, Rachel Brawner can never regain the six and one-half years' seniority she lost. However comparable any job may be with any other employer, Rachel Brawner must start at that new employment

[37] The opposition to certiorari erroneously states that Rachel Brawner "is among the lower quarter of the cafeteria's employees in seniority . . ." (p. 9, n. 6). On October 10, 1960, of the 35 employees then on the payroll, Rachel Brawner's seniority standing would be fourteenth from the top. This places her in the upper four-tenths, not the "lower quarter."

with zero seniority. And it hardly needs to be added that the "seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived." *Elder* v. *New York Central R.R. Co.*, 152 F. 2d 361, 364 (C.A. 6).

4. But it is not even true that Rachel Brawner has lost only her particular job and its perquisites. Her employment opportunities generaly have been drastically curtailed. Respondents themselves conceded in their petition for rehearing below that Rachel Brawner cannot be employed by "operators of restaurants and cafeterias . . . located on military installations in and around the Washington area" (Pet. p. 6). The injury is wider and deeper than that. As Oliver T. Palmer, business agent of the Union, testified at the arbitration hearing (R. 52):

> An employee who may be discharged as a security risk has not a ghost of a chance of getting a job in a Government cafeteria, and it is very difficult to obtain employment for any employee who has that tag on them, in any cafeteria. That is a problem, and if they have that tag, it is almost impossible to find them another job.

Rachel Brawner's effective debarment from private employment in cafeterias and restaurants operated by private employers on governmental premises is a serious inroad into her employment opportunities. Of the 2,600 employees represented by the Union, 2,000 are employed in cafeterias and restaurants located within governmental buildings (R. 52). And, as the business agent testified, even private employment on nongovernmental premises becomes "very difficult to obtain . . ." (R. 52). Were the actual extent of the

injury material, a trial would establish that from her discharge on November 15, 1956 to October 17, 1960, a period of 204 weeks, Rachel Brawner had been gainfully employed for about 105 weeks, or about 51 percent of the time, in contrast with her full time employment for six and one-half years before her discharge.

5. The injury from deprivation of employment on security grounds is not confined to economic loss. The stigmatization of reputation is a gnawing wrong. As Judge Fahy stated, "The public draws no sharp distinction between security and loyalty.[58] *Cf. Vitarelli* v. *Seaton*, 359 U.S. 535. As the Supreme Court has said of exclusion from public employment on disloyalty grounds, 'In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.' *Wieman* v. *Updegraff*, 344 U.S. 183, 191. Engineer and cook alike suffer, in spirit and in reputation. They should have equal protection" (R. 178). For the court below the "rhetoric in these arguments is greater than their substance." (R. 161). For most of us reputation is a dear thing. "Good name in man and woman, . . . is the immediate jewel of their souls."

6. The court below seems to stress that, between December 1 and 16, 1956, subsequent to her discharge by M & M on November 15, 1956, M & M offered Rachel Brawner employment at the Skylark Motel which it operated at Springfield, Virginia (R. 145, 159, 169), an offer which was rejected because the location was

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[58] The difference between loyalty and security is not of kind but of degree. "Most security cases are cut from the same cloth as loyalty cases, and involve the same elements of beliefs and associations." Brown, *Loyalty and Security*, 10 (1958). Detecting a security risk "gets one into judging loyalties." *Ibid.*

unsatisfactory (R. 131). This offer has no relevance to respondents' wrongs in causing Brawner to lose her employment at the Gun Factory cafeteria, in impairing her opportunity to obtain employment elsewhere, and in besmirching her reputation. No one is free to invade a person's rights in one place because the victim can exercise them in another place. *Cf. Schneider* v. *Irvington*, 308 U.S. 147, 163. The offer of employment would be relevant, if relevant at all, only to the question of mitigating damages, and whether the offer does go towards mitigation depends on such factors as the distance of the proffered job from Brawner's home, the availability and cost of public transportation, the time consumed in going to and from work, the kind of job it is, the rate of pay, and the working conditions.

In stressing the offer of alternative employment, the court below assumes, without the least supporting evidence, that the employment offered was in fact satisfactory. Yet, were the inquiry material at all, a trial would conclusively establish that it was not. For it would show that, to the extent that public transportation is even available, it would take Rachel Brawner a minimum of three hours to travel to and from her home and the Skylark Motel, and the daily fare would be $1.60.[59] At her hourly rate of pay of $1.18 (*supra*,

[59] Information received from the D.C. Transit System, Inc., concerning public transportation between Rachel Brawner's home and the Skylark Motel, shows that:

> "From 2342 Pomeroy Rd. S.E., [Rachel Brawner's home] walk to Stanton Road (one or two blocks). Take a W8 bus marked 'Navy Yard' to 10th & Pennsylvania. Then take an AB&W bus from 12th & Pennsylvania into Alexandria. Transfer at King and Washington Streets to another AB&W bus which goes into Springfield. The Skylark Motel is on Franconia Road and the bus passes the motel. The buses

p. 5), Rachel Brawner received $9.44 for an 8-hour day. Thus, assuming the same rate of pay at the Skylark Motel, $1.60 of Rachel Brawner's daily wage of $9.44, or about 17 percent of her earnings, would go to pay for transportation, and it would take her at least three hours to travel to and from work. This is hardly a satisfactory alternative job.

But the heart of the matter is that to treat this case as if it turns on an offer of alternative employment, whether good or bad, is to trivialize the law. Rachel Brawner as a petitioner in this Court asserts her rights on her own behalf. The Union as a petitioner in this Court asserts the rights of all employees it represents who are similarly situated. The rights of Rachel Brawner and her fellow employees do not depend upon whether the employer runs other establishments at which employment may be available, whether he is willing to offer alternative employment, or whether alternative employment is available from other employers. What the Rachel Brawners can do for themselves or what others are willing to do for them to mitigate the injury does not detract from their right to be free of unjust action at respondents' hands or from respondents' duty to refrain from unjust action.[60]

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from Alexandria to Springfield and vice versa only leave at the rush hours—they do not leave at all hours of the day. The one-way fares are as follows:

D. C. Transit—20¢ (token), 25¢ (cash)
AB&W —60¢

"The time spent in making the trip (one-way) would take at least an hour-and-a-half, depending on the kind of connections made."

[60] The court below would treat this case as if all that were involved were the transfer of an employee from one assignment to another within the same organization (R. 158-159). But in-

7. Respondents in their opposition to certiorari claim that as a result of the replacement of M & M by Inplant as the concessionaire operating the Gun Factory cafeterias, and notwithstanding Inplant's promise to reinstate Rachel Brawner "with retroactive seniority rights" if she prevails in her suit (*supra*, p. 18), Rachel Brawner "is in effect now in a position of a person seeking access to the base in order to assume *new* employment," and she should no longer be considered

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voluntary ouster of an employee from the unit covered by the collective bargaining agreement can in no circumstances be considered a conventional transfer; nor, t agreement aside, can anything in this case be treated as if it constituted merely normal personnel movement within an organization. Finally, the notion of the court below that it would be "fantastic" to suggest that employees cannot be moved "from here to there" willy-nilly mirrors simply the inadequacy of its information (R. 159). Prohibition of involuntary transfer is not uncommon in collective bargaining agreements: "Certain restrictions on transfers are also included in a number of agreements. The most common declares that permanent transfers may be made only by mutual consent, that no employee is required to accept such transfer. These provisions apply particularly to interplant transfers involving a change in residence." *Basic Paterns in Union Contracts*, Bur. Nat. Aff., 75:10 (4th ed., Oct. 1957). For example, the nationwide agreement between the Western Union Telegraph Company and the Commercial Telegraphers' Union, AFL-CIO, which covers an operation in which personnel movement is relatively frequent, contains in its Section 7.11 the flat prohibition that "No employee shall be transferred without his consent." Section 23(c) of the Ford-UAW agreement provides that "Transfers of seniority employees from one plant to another may only be made with the signed consent of the employee and his Committeeman." 1 CCH Lab. Law Rep., Union Contracts, ¶ 59,923, p. 86,036. Section 8(b) of the Pittsburgh Plate Glass Co.—Glass Blowers agreement provides that "No employee shall be compelled to accept a proposed transfer." *Id.* ¶ 59,938, p. 36,811. For other contracts, see Collective Bargaining, Negotiations and Contracts, Contract Clause Finder, Bur. Natl. Aff., 68:422-68:423; Collective Bargaining Provisions, Promotion, Transfer, and Assignment, Bull. No. 908-7, U.S. Dept. Lab., Bur. Lab. Stat., 40-41 (1948).

to be striving "to protect on old job . . ." (p. 9). This is the sheerest casuistry. It is not the job that is new but the employing corporate entity. And even as to the latter, the President and Treasurer of Inplant had been supervisor of the Gun Factory cafeterias when operated by M & M, and the Vice-President and Secretary of Inplant had been secretary of M & M (*supra*, p. 18). That the change in the employing entity made no change in the essential attributes of the employment relationship was evidenced by Inplant's prompt recognition of the Union as the representative, its assumption of the obligations of the existing collective bargaining agreement, and its promise to reinstate Rachel Brawner (*supra*, p. 18). A change in the identity of the employer without alteration of the essential attributes of the employment relationship does not change the character of the job or the employee's interest in it.[61] But even if it could be said that Brawner's promised employment by Inplant is acquisition of a new position, not reinstatement in an old position, it would make no difference. As with the merchant seamen in *Parker* v. *Lester*, 227 F. 2d 708, 713-714 (C.A. 9), "Although the employment of which plaintiffs were deprived was prospective only, yet their right to earn a livelihood, like that in *Traux* [v. *Raich*, 239 U.S. 33], was entitled to protection at the hands of a court of equity." Getting a job is as important as keeping a job.

In sum, *Greene* v. *McElroy* cannot be distinguished upon the ground that William Greene was hurt but Rachel Brawner was not. Both suffered enough, and

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[61] *Cf. Miller Lumber Co.*, 90 NLRB 1361; *National Labor Relations Board* v. *Armato*, 199 F. 2d 800 (C.A. 7); *National Labor Relations Board* v. *Colton*, 105 F. 2d 179, 183 (C.A. 6).

it is an almost insulting irrelevancy to ask who suffered more.

B. LAND OWNERSHIP

The court below states that *Greene* v. *McElroy* is different because William Greene worked on private property while Rachel Brawner worked on federal property. Denial of access to her place of employment within the grounds was, so the court states, in the exercise of the commanding officer's "right to protect entrance to the Factory"; "we fail to perceive any limitation upon the discretion of the commanding officer in respect to civilian presence within his command", nor any public right which would "act as a restriction upon the otherwise unfettered discretion of naval officers in such a matter" (R. 155).

On this premise, had William Greene worked on federal property, his employment could have been destroyed and his reputation besmirched with no hearing at all, via the power to control access to governmental land. We were unaware that authorization for acts done by a governmental official is unnecessary if the acts are performed on land owned and occupied by the sovereign. Nor were we aware that the Constitution stops at the entrance to a Navy installation. *Cf. Reid* v. *Covert*, 354 U.S. 1; *Kinsella* v. *Singleton*, 361 U.S. 234; *Grisham* v. *Hagan*, 361 U.S. 278; *McElroy* v. *Guagliardo*, 361 U.S. 281. Denial of bare access to the premises unaffected by any other interest would be one thing, but debarment from the grounds on security considerations with the consequence of job loss, employment opportunity impairment, and reputation besmirchment is quite another. A man's home may be his castle, but that does not mean he may drive his wife

and children from it. Nor does federal ownership of the premises on which the Gun Factory is located mean that officials may destroy the employment and sully the name of persons working within the grounds.

As Judge Edgerton observed (R. 179), were the premise sound, no governmental employee could ever have successfully challenged his ouster from public employment on security grounds. For the short answer to his protest would have been that the sovereign cannot be required to permit him to work in a building it owns and from which his entry could be barred. But this Court has required the restoration of public employment to governmental employees, as to federal employees because the ouster exceeded or did not conform with the authority conferred (*Cole* v. *Young*, 351 U.S 536; *Peters* v. *Hobby*, 349 U.S. 331; *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535), and as to state employees because the authority conferred was constitutionally invalid (*Wieman* v. *Updegraff*, 344 U.S. 183; *Slochower* v. *Board of Higher Ed.*, 350 U.S. 551). And the "liberty [of persons in private employment] to follow their chosen profession is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job." *Parker* v. *Lester*, 227 F. 2d 708, 717 (C.A. 9).

Respondents would distinguish upon the ground that these cases stand only for judicial vindication of rights in public employees created by statute, executive order, or regulation. But this distinction does not explain the protection extended to public employees of the states. For when this Court safeguards the public employment of state employees it does not vindicate state-created rights but protects only the federal rights guaranteed

by the United States Constitution. And the state's ownership or control of the property on which its employees work does not relieve it of its constitutional obligation to refrain from unconstitutional treatment of its public employees. Nor does respondents' distinction explain the basis for decision concerning the public employment of federal civil servants. True, this Court has thus far been able to base decision upon the nonconstitutional ground of departure from a controlling statute, executive order, or regulation. But this ground for decision has been importantly influenced by the need to eschew constitutional objections which would otherwise be presented. *Peters* v. *Hobby*, 349 U.S. 331, 338; Mr. Justice Harlan concurring in *Greene* v. *McElroy*, 360 U.S. 474, 509. Federal ownership or control of the place of employment does not dispense with the constitutional objections. Stating that "None would deny such limitations on congressional power," this Court agreed, notwithstanding governmental dominion over the property on which they work, that "federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100.

Nor do respondents advance their position by asserting the need to protect military secrets within naval installations. The same need "to protect the integrity of secret information" was pressed in *Greene* v. *McElroy*, 360 U.S. 474, 493, but that need was held not to validate otherwise unauthorized means directed to that end. As a factor in decision the element of

military secrecy has no greater urgency on military bases than off them. There are as many secrets in private factories and laboratories as there are in governmental factories and laboratories. "The security dangers are about the same whether the Navy builds an atomic-powered submarine in the Brooklyn Navy Yard or has it built by the General Dynamics Corp."[62] Secrecy as such cannot differentiate governmental premises from private premises. And the appeal to the need for secrecy is terrifyingly ironic when it is recalled that in this case summary governmental power is brought to bear, in the name of "the realisms of the world situation" (R. 154), upon a short order cook who has no access to classified information.

There is in truth no issue of secrecy in this case at all. As Mr. Justice Harlan observed in concurrence in *Greene* v. *McElroy*, 360 U.S. 474, 510, "The basic constitutional issue is not whether petitioner is entitled to access to classified material, but rather whether the particular procedures here employed to deny clearance on security grounds were constitutionally permissible." Nothing prevents summary denial of access to a place of employment within a naval facility on security grounds *pending* a hearing into the validity of the charges levelled against the employee, with compensation to the employee for any loss of earnings sustained by him if the charges against him are not substantiated upon a hearing. This eliminates any risk to any governmental interest from acts detrimental to security, while at the same time preserving the right to a hearing. It is unnecessary to the security of any valid governmental interest to jettison a hearing. And it is indispensable to a free society to preserve it zealously.

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[62] Brown, *Loyalty and Security*, 61 (1958).

Respondents are therefore reduced to the claim that the hearing itself is objectionable. And this was their argument on their petition for rehearing below, their position being that it would be inconvenient and expensive to hold hearings (pp. 11-12). We had not understood that due process was to be conferred, and First Amendment rights protected, only if it was cheap and easy. And if it be true that to conduct hearings would entail "a tremendous expenditure of time and money" (pet. for rehearing, p. 12), that expenditure would indeed be "applied to the defense of the United States" (*ibid.*) within the genuine scope of that term. For it takes more than guns to defend the United States. It takes a civilized procedure as well.

Since secrecy does not distinguish *Greene* v. *McElroy*, and since the right to a civilized procedure is in any event not incompatible with maintenance of security, respondents in the end are stripped to the single plea of bare dominion over property. They assert an "absolute control over property" (opp. to cert., p. 15),[63] insisting that access to it is a privilege which they are free to grant or withhold at will (*id.* at 15-16). A similar claim of "unrestricted power" exalted into "an absolute" was rejected by this Court just the other day (*Gomillion* v. *Lightfoot*, 29 U.S. Law Week 4024, 4025), this Court reminding that state power "acknowledged

[63] The cases cited in support have about as much relevance to the issues in this case as the grazing of cattle has to the employment of human beings. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, concerns occupancy of public lands without compliance with regulations not shown to be invalid; *United States* v. *Midwest Oil Co.*, 236 U.S. 459, concerns withdrawal of public lands containing petroleum deposits from private acquisition; *Light* v. *United States*, 220 U.S. 523, concerns regulation of grazing on forest preserves; and *Camfield* v. *United States*, 167 U.S. 518, concerns inclosure of public lands.

to be absolute in an isolated context" cannot be exploited "to justify the imposition of an 'unconstitutional condition'" (*id.* at 4026).[64] Even as to benefits conferred by government, the influence of government in modern society is too exigent to treat it as if in the exercise of its functions it were a mere distributor of foregoable largesse which the putative donee is realistically free to spurn if the terms of the gift are objectionable. And so "conditions imposed upon the granting of privileges or gratuities must be 'reasonable.'" *Speiser* v. *Randall*, 357 U.S. 513, 518. Hence, even on respondents' verbalization of the issue in terms of privilege, what respondents claim they are privileged to do is plainly unreasonable. For they assert the absolute power summarily to brand an employee as a security risk and thereby to cause him to lose his job, impair his opportunity for employment elsewhere, and sully his name. Control of property however absolute privileges no such conduct. At this late date an appeal to privilege to exercise the rights of others is jejune.[65]

This Court has already spoken. Where a governmental manager, installed by a federal agency to supervise a village owned by the federal government, denied a person the right to religious proselytism in that village, this Court held it no defense that "the federal Government owns and operates the village. * * * Certainly neither Congress nor Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment." *Tucker* v. *Texas*, 326 U.S. 517.

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[64] See also, *Frost* v. *Railroad Commission*, 271 U.S. 583; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 349-351.

[65] See Davis, *The Requirement of A Trial-Type Hearing*, 70 Harv. L. Rev. 193, 225-243 (1956).

520. As this Court said of a company-town wholly owned by a corporation, so with the premises of the Gun Factory wholly owned by the Government, "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U.S. 501, 505-506. And whether it is "a private corporation" or "the Federal Government" that "owns and operates" the property "does not affect the result." *Tucker* v. *Texas*, 326 U.S. 517, 520. Within our scheme of limited powers, federal officers are not lords of the manor empowered to do as they will.

CONCLUSION

For the reasons stated the judgment below should be reversed.

Respectfully submitted,

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